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ABSTRACT

This House of Representatives subcommittee hearing report considers the extension of the Family Educational Rights and Privacy Act, commonly referred to as the Buckley amendment. Statements, letters, and supplemental materials favorable to the act, with suggestions for future improvement, come from government administrators and a national citizens group, while unfavorable comments come from both students and higher education administrators. The appendices include the act, its rules and regulations, the commission's recommendations, and a miscellany of letters and statements. (LS)

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PART 9: FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

HEARING

BEFORE THE

SUBCOMMITTEE ON ELEMENTARY, SECONDARY, AND VOCATIONAL EDUCATION

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 15

TO EXTEND FOR FIVE YEARS CERTAIN ELEMENTARY, SECONDARY, AND OTHER EDUCATION PROGRAMS

HEARING HELD IN WASHINGTON, D.C.
AUGUST 2, 1977

Printed for the use of the Committee on Education and Labor
Carl D. Perkins, *Chairman*

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CONTENTS

Page

Hearing held in Washington, D.C., August 2, 1977 1

Statement of—

- Higgs, Louis D. Deputy Executive Director, Privacy Protection Study Commission 25
- McFee, Thomas, Deputy Assistant Secretary for Management, Department of Health, Education, and Welfare 21
- Salett, Stan, National Committee for Citizens in Education 56
- Schirle, Steve Associated Students of the University of California 75
- Steiner, Daniel general counsel, Harvard University 39

Prepared statements, letters, supplemental materials, etc.—

- Lionowes, David M., Chairman, Privacy Protection Study Commission, testimony of 26
- McFee, Thomas S., Deputy Assistant Secretary for Management, Department of Health, Education, and Welfare, testimony of 2
- Salett, Stanley J., senior associate, National Committee for Citizens in Education, statement of with attachments 57
- Schirle, Steve, Associated Students of the University of California at Berkeley, statement of 75
- Steiner, Daniel, general counsel, Harvard University, statement of 40

APPENDICES

Appendix 1.—General Education Provisions Act, Sec. 438, "Family Educational Rights and Privacy Act" 89

Appendix 2.—Privacy Rights of Parents and Students, Final Rule on Education Records, from Federal Register, June 17, 1976 96

Appendix 3.—Chapter 10, Recordkeeping in the Educational Relationship, from Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission 111

Appendix 4.—Miscellaneous letters and statements:

- Walker, Emery R. Jr., dean of admission, Claremont Men's College and Harvey Mudd College, Claremont, Calif., letter to House Subcommittee on Elementary, Secondary and Vocational Education- 163
- Conner, J. Douglas, executive secretary, American Association of Collegiate Registrars and Admissions Officers, letter to Chairman Perkins, dated August 1, 1977 165
- Kiernan, Owen B., National Association of Secondary School Principals, Reston, Va., letter to Chairman Perkins, dated August 2, 1977 167
- Baisinger, Mrs. Grace, National Congress of Parents and Teachers, letter to Chairman Perkins dated August 16, 1977 169
- Brinson, Dr. Kenneth C., dean of student affairs, Somerset County College, Somerville N.J., letter to subcommittee, dated August 26, 1977 182
- Bennett, Robert F., Governor, State of Kansas, Topeka, Kans., letter to Chairman Perkins, dated August 31, 1977, with several enclosures 171
- Nordvall, Robert C., assistant dean of the college, Gettysburg College, Gettysburg, Pa., letter to Congressman Goodling, dated August 23 1977 183
- Rioux, Bill, the National Committee for Citizens in Education, Columbia, Md., news release enclosing a survey, dated September 19, 1977 186

PART 9: FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

TUESDAY, AUGUST 2, 1977

House of Representatives,
Subcommittee on Elementary, Secondary
and Vocational Education,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:15 a.m., in Room 2261, Rayburn House Office Building, the Hon. Carl D. Perkins presiding.

Members present: Representatives Perkins, Blouin, Mottl, Weiss, Quie, Buchanan, and Goodling.

Staff present: John F. Jennings, majority counsel; Nancy L. Kober, staff assistant; and Christopher Cross, minority senior education consultant.

Mr. **Buchanan** (presiding). Today's hearing is on the Family Educational Rights and Privacy Act of 1974, commonly known as the Buckley amendment.

That statute became law as part of the Education amendments of 1974, Public Law 93-380. The Buckley amendment has as its purpose giving parents of children in elementary and secondary schools and students in higher educational institutions the right to inspect the regular files kept on students by the educational institutions. It is meant to give parents and students protection against damaging remarks being put in files without those remarks ever being subject to disclosure or rebuttal.

We look forward with a great deal of interest to today's hearing since the Buckley amendment has never been the focus of a hearing before in education committees. We are particularly interested in hearing how the Department of Health, Education, and Welfare is setting about its task to administer the law and would like to know from the different commissions and organizations represented here today their opinions on whether that law is functioning well enough as it is or whether it needs to be amended.

So without any further remarks, we would like to begin today's testimony with Mr. Thomas McFee, from the Department of HEW, and then the representatives of all the other organizations will testify immediately after Mr. McFee in the form of a panel. So if you want to come forward we will hear Mr. McFee first, and then Mr. Higgs, Mr. Steiner, Mr. Salett, and Mr. Schirle, each in turn.

Mr. McFee, you may either give your testimony in full, or you may summarize it and it will all be included in the record.

Mr. **McFee**. Mr. Chairman, I would like to summarize it, and I have it available for the record, and if it pleases the Chairman, I would like to introduce it in its entirety.

Mr. **Buchanan**. Very good; without objection, it is so ordered.

[The information follows:]

TESTIMONY

BY

THOMAS S. MC FEE
DEPUTY ASSISTANT SECRETARY
FOR MANAGEMENT

OF

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

BEFORE THE
SUBCOMMITTEE ON ELEMENTARY, SECONDARY
AND VOCATIONAL EDUCATION
RAYBURN HOUSE OFFICE BUILDING
AUGUST 2, 1977

Mr. Chairman and members of the Committee, I am Thomas S. McFee, Deputy Assistant Secretary for Management in the Office of the Assistant Secretary for Management and Budget at the Department of Health, Education, and Welfare. As the individual to whom responsibility was assigned to develop the program and regulations necessary to administer the Family Educational Rights and Privacy Act of 1974, I hope that a discussion of my experiences over the past two and one-half years will be useful to the Committee. I can assure you that the Committee's decision to hold oversight hearings at this time will be of significant assistance to the Department in its current review of operational experience of the Education community under the final regulation. This review will culminate in regulatory modifications and/or legislative proposals, as may be necessary later in the year.

Though I am sure you are familiar with the basic provisions of the Act and the events surrounding its enactment, I would like to take a few moments to review these matters.

The Act gives certain rights to parents regarding their child's education records. These rights transfer to the student or former student who has reached the age of 18 or is attending any school beyond the high school level. Students and former students to whom the rights have transferred are called eligible students.

-- A school must allow parents or eligible students to inspect and review all of the student's education records maintained by the school. However, this does not include the review of personal notes of teachers, or, at the college level, medical or law enforcement records. Schools are not, in our view, required to provide copies of material in education records unless, for reasons such as illness or great distance, it is impossible to inspect the records personally. The school may charge a fee for copies.

-- Parents and eligible students may request that a school correct records believed to be inaccurate or misleading. If the school refuses to change the records, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still refuses the correction, the parent or eligible student has the right to put a note in the record explaining his or her concerns. This right does not extend to challenging whether the grade assigned by an instructor was proper.

-- Generally, the school must have written permission from the parent or eligible student before releasing any information from a student's record. In an effort to permit the school to continue its normal business and activities, the law allows a school to set its own rules about who among the following people may see records without the required consent:

- School employees who have a need-to-know;
- Other schools to which a student is transferring;
- Parents when a student over 18 is still a dependent;
- Certain government officials who need-to-know to carry out lawful functions;
- Sponsors of financial aid to a student;
- Organizations doing certain studies for the school;
- Individuals who have obtained court orders or subpoenas;
- Persons who need to know in cases of health and safety emergencies.

Also, in order to allow for the continued free flow of what has come to be viewed as public information, Congress provided that "directory" type information such as one's name, address, telephone number, date and place of birth, honors and awards, and activities, may be released to anyone without first getting permission. However, while schools need not obtain prior consent they must initially advise the parents and students of their intent to establish and the type of information that is to be classified as directory information, and provide a reasonable amount of time to allow the parent or eligible student to tell the school not to reveal directory information about them.

-- Finally, the school must notify parents and eligible students of their rights under this law. The actual means of notification (special letter, inclusion in a PTA bulletin or student handbook, or newspaper article) is left to each school.

This Act was offered as a floor amendment to the Senate version of the Education Amendments of 1974. Consequently, it did not have the benefits which accrue through the normal legislative hearing process. As the effective date of the Act approached it became abundantly clear that major problems existed. In response to this recognition, then Secretary Weinberger designated my organization as the "office" called for in the Act and asked that I lead a team whose goals were (1) to assist the Congress in developing necessary modifications to the law and (2) provide guidance, to the public in the form of proposed rules, by year's end. Proposed rules were published on January 6, 1975, missing the target by one week; however, publication by that date was, I believe, quite a feat in view of the fact that the amendments to the original law were not signed by the President until December 31, 1974.

With publication of the proposed rules, our work really began. In addition to the 321 comments received during the sixty-day public comment period, we received approximately eight thousand inquiries during the nine months of operation which preceded development of the final regulation. We recognized early in the process of developing regulations that the range of schools to be covered, the subject matter of the Act, and the limited express authority to promulgate regulations argued against prescriptive standards. Consequently, I decided to involve, to the maximum extent possible, those who would be affected by the Act in the development of the regulation. We accomplished this by a continuous exchange of thoughts with Congressional staff and other interested parties, both educators and parents, as to our "current thinking" on the regulations.

Additional considerations in developing the regulation and our mode of operation pursuant thereto were the following criteria:

- would we lessen the administrative burden to which educational institutions and agencies might otherwise be subjected?

- was there an indication that educational agencies and institutions desired additional explanation or exemplification?
- would the regulation be consistent with the statutory provision on which it was based?
- would the rights accorded parents and students be preserved?
- would the resulting provision prove to be administrable by the Department?

I think we applied these criteria prudently and that, the final regulation (published last June 17, 1976) achieves the goal of giving education agencies and institutions the necessary guidance, while at the same time allowing them the flexibility to meet their own particular needs; however, this goal has not been achieved at the expense of the rights accorded parents and students.

The resultant regulation is primarily interpretive in nature. As such, it meets the needs of both educators and parents who have consistently held that a set of minimum standards is necessary if they, the laymen to whom it applies, are to avoid confusion. This is not, of course, to say that we have solved all the problems or answered all the questions.

During the course of developing the final regulation, a number of decisions were made or conclusions reached that reflect our management philosophy and impact on our administration of the Act. All of the decisions and conclusions measure up quite well against the abovementioned criteria. For example,

- The scope of coverage would be limited, in a manner consistent with the statutory provision, to those schools receiving funds either directly or indirectly under Office of Education programs rather than extending the scope to non-OE based education programs. We might do well at this point to note that while the Act is purported to be a functional Privacy Act, it does not cover the education records of all educational institutions but it does cover what some would consider non-education records at some institutions.
- We concluded that the statutory provision that no funds be made available to education agencies or institutions having a policy that denies or that effectively prevents the exercise of rights implies that there must be an affirmative policy in this regard; that is, that education agencies or institutions would be required to promulgate their own rules and procedures for complying with the Ac

- On the assumption that policy/procedure development would undergo scrutiny by policy makers at the State or local level, and since HEW approval of a policy document would, at the same time generate a massive workload and not necessarily be an accurate reflection of actual practices, it was decided to offer technical assistance, but not to require that each education agency and institution submit its policy document to us for review and approval.
- The standard assurance required of those seeking funds was dropped. As with the policy statement review decision, an assurance of compliance at a given time was not considered to be of significant value in administering the Act.
- The position was adopted that the law represented minimum standards and schools could provide even greater safeguards if they wished.
- A conclusion was reached that the Act could not be used to override existing processes and practices which were not in direct conflict with its basic purposes. Furthermore, upon a determination that due process had been accorded, the decision was made not to question institutional determinations.

- The case or complaint based enforcement mode was adopted as being consistent with the statutory requirement that voluntary compliance be sought by the Secretary. The alternative was a massive compliance monitoring effort, which would have been contrary to our decision on review and approval of policy statements.
- The voluntary compliance aspect of law also led us to conclude that there should be no punitive application of the funds cut-off provision and that States with conflicting laws would be given reasonable opportunities to make necessary modifications.

Having discussed some of the underlying principles upon which we operate, I would now like to turn my attention to our operational experiences. First and foremost, I think we can say with some degree of assuredness that while our options on enforcement sanctions appear to be limited, this has presented only a minimal hindrance to our ability to achieve voluntary compliance. Second, the manner in which our resources have been targeted seems to be having a positive effect. Our approach is akin to preventive maintenance, if you will--answer inquiries (now at the 16K level), undertake outreach efforts first to administrators (50 speeches and equal number of conference calls) and then parent/student groups and finally investigate complaints (approximately 100).

We are, of course, operating at the sufferance of what administrators do to comply with the Act and whether parents and students choose to exercise their rights. People just have not been beating down doors to get at their records. This, of course, could change at any moment. We have noticed, for example, an increase in workload associated with FERPA-related articles in mass circulation magazines.

While I can, and will, point out a number of problem areas, the single most positive surprise has been that the education process has not come to a screeching halt; parents and administrators are not at one another's throats; and, HEW has neither inundated schools with superfluous requirements or, in turn, been inundated with paper. I am pleased to say that with a few exceptions we are current in responding to inquiries and have closed more than two-thirds of our complaints without resorting to threat of funds cut-off. We have high hopes of similar success with the remaining complaints, which are in various stages of active investigation.

On the problem side of the ledger, I find that many of the alleged violations, including those which we believe are valid, stem from misinformation. (Many of what are at first glance complaints are actually inquiries regarding provisions of the law.) For that reason I have taken the position that part of our investigative role is to provide accurate, up-to-date information to all who are affected by the Act. Part of our investigative process is to offer our assistance to schools in analyzing their required policies or, in the evant that their policy is not in final form, to offer technical assistance in the development of those policies. However, it is not my intention to dictate to schools what means they must employ to come in to compliance with the Act, but rather to suggest alternatives which they may consider, or, in some cases suggest alternative means for their consideration with the final decision resting, for the most part, with the school.

While this approach to compliance has been greatly appreciated by those schools with whom we have been involved in the complaint process, it has not been entirely free from problems. From my correspondence it seems that this approach is so unique that some administrators have difficulty believing that we are serious in our belief that our role is one of assisting them in making the decision which best meets their particular needs as opposed to one of telling them what we believe will meet those needs. I believe that so long as the means of implementation designed by the institution function in such a way as to ensure that the institution meets its responsibilities under the law, and to ensure that the rights of parents and students are protected, the role of my office as I have outlined it to you is not only unique in the relationship between government and the people it serves, but also effective and efficient.

While the problem I mentioned is essentially procedural, and one which I believe will be resolved as we continue our enforcement efforts, there are problems of a more technical nature which I would like to bring to your attention.

Again, for the most part, these stem from misunderstanding or misinformation. For example, both parents and schools seem confused over the disclosure of information to the parents of dependent, eligible students. The law stipulates that all rights and responsibilities accorded to parents pass to the student once he or she reaches the age of 18 or enrolls in a postsecondary school. In other words, once he or she becomes an eligible student. This means that only the student has an absolute right of access to the records, only the student can initiate the challenge procedures, and only the student may give the consent for disclosure from his or her education record.

However, even before the Act became effective in November 1974, the Congress recognized that to prohibit schools from disclosing information to the parents of an 18 year old high school student or a college student for whose tuition the parent was responsible, without first obtaining the student's consent, was inappropriate. Consequently, the Act was amended in December 31, 1975, to permit schools to make disclosures to the parents of dependent children.

Thus, while parents of dependent students do not have a right to have access to their children's education records, a school, depending upon its own policy on the matter, may disclose information to the parents without obtaining the consent of the eligible student. Clearly, the choice of whether to do so rests with the institution and there should be no cause for confusion on this matter. Unfortunately, some schools and/or parents seem to be operating at the sufferance of the earlier statutory provision.

Another domestic relations issue involves the rights of non-custodial parents. Our view is that the law gives rights to parents. Consequently, even non-custodial parents have rights; unless, of course, their rights to be involved in the educational well-being of their children are limited by some legally binding document--a State law or specific language in a divorce decree, for example. To assist schools to avoid becoming embroiled in domestic squabbles, we provided that rights be accorded all parents unless evidence that they should not is made available to the school. While most have eagerly accepted this solution, others--supposedly for reasons of administrative convenience--are inclined to accord rights only to custodial parents.

The so-called "directory information" provision is another area about which there is considerable confusion. I have heard of several instances in which an individual has made a legitimate request for the names and addresses of graduating seniors only to be refused on the basis that the Act would prohibit disclosure of such lists. This would be true in cases in which the school had determined that it would not disclose directory information for any reason and had not followed the procedure I outlined earlier. However, if the school had followed that procedure, neither the Act nor the Department's implementing regulation would prohibit the disclosure of such a list. Accordingly, any hesitancy on the part of school administrators to provide such information is probably due to a lack of understanding of their discretionary authority or to the fact that they have not followed the required procedure.

One complaint frequently heard is that the Act stifles legitimate education-related research. The complaint stems, of course, from the general restriction on disclosure of personally identifiable education records to third parties. However, most researchers and administrators fail to appreciate that nothing in the law or the regulation prohibits schools from providing data in non-personally identifiable form. Even when a researcher seeks access to individual student records, there are several alternatives available. First, either the school or the researcher may seek the consent of the parent of the students or in the case of eligible students, the students themselves. If this is found impracticable, the law permits the school to make the disclosure without consent so long as certain conditions prevail. More specifically, schools are permitted to make disclosures to individuals or organizations conducting research which will benefit the school in developing, evaluating, or administering predictive tests, administering student aid programs, and improving instruction. The law further provides that such studies must be conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and that personally identifiable information will be destroyed when it is no longer needed for the purpose for which the study was conducted.

The decision to disclose information rests with the school. If the school believes that it will accrue some benefit in one of the three statutory areas provided and if the research organization is willing to abide by the safeguarding conditions set forth in the Act, there is no reason why the school could not provide the information necessary for a study without the necessity of obtaining the consent of the parent or eligible student.

Other issues that may be of interest to you are the following:

- The so-called law enforcement exemption continues to be a problem area. Though the Congress attempted to balance competing interests (keeping police out of school records and students out of investigative records) and, we attempted through our interpretation of the statutory phrase "same jurisdiction" to mitigate dislocating effects, old practices are hard to die. In addition, some press media representatives have argued that this provision is a restriction on their first amendment right.
- There has been concern that the general limitation on disclosure from education records without prior consent has had a deleterious effect on efforts aimed at detecting incidents of child abuse and neglect. Here we have been able to allay the fears of advocates by pointing out that the Act provides several relevant circumstances pursuant to which reports can be made without obtaining prior consent. For example, pursuant to State statute, in a health or safety emergency or when the report is based on personal observation rather than information from an education record.

- The treatment in the Act of medical records has raised several serious questions. While apparently based in the belief that direct access by the subject individual could have a detrimental effect, parents of elementary and secondary school children can obtain records containing information that could affect both parent and child. For example, direct access to a school health record may provide a parent with evidence of the child having had a venereal disease. While the privacy rights of the parent vis-a-vis those of the child are obviously a complex issue, I am sure you can appreciate the effect of this example on efforts to control and treat such diseases.

At the post-secondary level, the law provides for medical and treatment records to be available to the eligible student indirectly, through disclosure to an appropriately qualified professional of the student's choosing.

In closing, I would like to reemphasize my belief that the implementation of the Act is progressing smoothly. My experience has shown that the majority of post-secondary institutions have moved rapidly to implement the law and it is my hope that the majority of elementary and secondary school districts will be in full compliance with the Act by the beginning of the upcoming school year.

STATEMENT OF THOMAS McFEE, DEPUTY ASSISTANT SECRETARY FOR MANAGEMENT, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. McFee. I am Thomas McFee, Deputy Assistant Secretary for Management in HEW, I am the individual assigned responsibility for the development of the program, and the regulations necessary to administer the Act, I hope that my experiences over the last two and one-half years will be useful to this committee. I can assure you that the committee's decision to hold oversight hearings at this time will be of significant assistance to the Department in its current review of operational experience of the education community under the final regulation published over a year ago.

At the time we published these regulations, we promised to open up the comments process again after a year of operational experience. We did that on the first of July, and there is a 90-day comment period which is now running and will be completed by October first.

Because I am sure that you are familiar with the Act and the events surrounding it, I will not take the time at this point to review them. My prepared statement includes a short summary of the provisions of the Act. In fact, my prepared statement is more detailed regarding all the brief comments, I will make this morning.

The Act, was offered as a floor amendment to the Senate version of the Educational Amendments of 1974 and consequently, as you have already stated, did not include benefits which normally accrue through the legislative process. As the effective date of the Act approached, it became abundantly clear that without this legislative history, major problems existed.

Recognizing these problems, the then Secretary of HEW, Secretary Weinberger, designated my office as the one called for in the Act. I was to lead a team whose goals were; first, to assist Congress in developing necessary modifications to the law and second, to provide guidance to the public in the form of proposed rules by the year's end.

These proposed rules were published on January 6th, 1975, missing our target by one week. However, the publication by that date, I believe, was quite a bureaucratic feat in view of the fact that the amendments to the original law were not signed by the President until six days before we issued the proposed rules.

With the publication of the proposed rules, our work really just began. In addition to the 321 comments that we received during the 60-day comment period, we received approximately 8,000 inquiries and questions during the nine months of operations while we were developing the final regulations. We recognized very early in the process that there was a very limited expressed authority in the statute to promulgate regulations and that there was a need for a tremendous amount of input from the organizations which we were about to regulate.

I believe that our decision to involve the educational organizations and institutions, the educational community, in general, with a considerable exchange of thoughts with Congressional staff members and other interested parties was one of the real keys to our success in the final regulations. When we considered these varied inputs, we made an early decision that the regulation should not be a detailed prescription standard, but rather a guideline for schools to follow as they came into compliance with the Act.

We set down some criteria as described in more detail in my prepared statement. These would be measures we could use as we made proposed changes in the regulations to see if we were overburdening educational institutions with needless procedures. They would help us determine if we were providing them, the kinds of guidance that many of them had asked for, and they would tell us whether we were consistent, of course, with the statute, without giving up the rights it had accorded parents and students. And lastly, and very importantly, the criteria would show us if the resulting regulations would be administratable by the Department.

I would like to deviate for a moment here. Our experience revealed a concept that is tremendously important to persons responsible for the administration of programs at the Federal level.

All too often both Congress and the executive branch initiate programs with administrative procedures that prove to be overburdening, both on the institutions and the Federal Government. Neither has ability to carry through the overburden of such administrative procedures. We were very sensitive to this particular issue.

Chairman **Perkins (presiding)**. May I say that is delightful to hear from somebody in the Department of Health, Education and Welfare.

Mr. **McFee**. I believe that we applied our criteria prudently and that the final regulations, which I mentioned were published about a year ago, achieve the goal of giving educational agencies and institutions the necessary guidance, while at the same time allowing them the flexibility to meet their own particular needs.

Also, I am pleased to report that this goal has not been achieved at the expense of the rights accorded to parents and students. The final regulation is primarily interpretative in nature. As such, it meets the needs of those educators and parents who have consistently held that a set of minimum standards is necessary, if they, the laymen to whom it applies, are to avoid confusion. This is not, of course, to say we have solved all the problems or answered all the questions with our regulatory process.

During the development of the final regulations, a number of decisions were made or conclusions were reached that reflect our management philosophy and impact on our administration of the Act. All of the decisions and conclusions measure up quite well against the criteria which I discussed earlier.

Briefly, we limited the coverage of the regulation to the statutory provisions of the Act. We concluded that the statutory provision that "no funds would be available to educational agencies having a policy that denies,"—gave us a basis for requiring educational institutions to promulgate their own rules and procedures for complying with the Act.

On the assumption that policy development procedures at local institutions would be subject to some scrutiny at the State and local level, we decided it would be inappropriate to review and approve these at the Federal level. The standard assurance used in so many programs was not included in our regulations. We took the position that the law represented a minimum set of standards and schools could provide greater safeguards if they wished. We reached a conclusion that the Act could not be used to override existing procedures and practices that did not directly conflict with the basic purposes of the Act. In fact, we attempted to maximize procedures and processes that were already operating in educational institutions.

The hearing process, for example, in many institutions was already in place. It was simple to adopt it and incorporate it into implementing regulations.

We concluded that the case or complaint based enforcement mode was consistent with the statutory requirement that voluntary compliance should be sought by the Secretary. This voluntary compliance aspect of the law also led us to conclude there should be no punitive application of the funds cut-off provision. States with laws that conflicted with the Act would be given a reasonable opportunity to make modifications necessary to resolve the difficulty.

Again, as an aside, this approach to the problem of conflicting State laws has worked out very well. There have been amendments in almost all State record-keeping laws to make them consistent with the Act, and we know of only one or two cases where problems remain.

Having discussed some of these underlying principles, I would like to turn my attention very briefly to some of our operational experiences. First, and foremost, I think we can say with some degree of assuredness, that while the law limits the options on enforcement sanctions, this has not presented a severe hindrance to our ability to achieve voluntary compliance.

Second, the manner in which our limited resources have been targeted, seems to be having a positive effect. The approach we have been taking is akin to preventive maintenance, if you will. Answer inquiries which have now reached around the 6,000 level; undertake outreach efforts to administrators first and then to parents and student groups; and finally investigate complaints which have now reached almost 100.

While I can and will point out a number of problem areas, the single-most positive surprise has been that the educational process has not come to a screeching halt. Parents and administrators are not at one another's throats, HEW has neither inundated schools with superfluous requirements or, conversely, has not itself been inundated with paper. I am pleased to say that, with few exceptions, we are current in responding to inquiries and we have closed more than two-thirds of our complaints without resorting to threats of funds cut-off.

We have high hopes of similar success with those in the remaining complaints that are at various stages of investigation.

On the problem side of the ledger, I find that many of the alleged violations, including those which we believe are valid, still stem from misinformation. For that reason, I have taken the position that part of our investigative role is to provide accurate, up-to-date information to all those who are affected by the Act. Part of our investigative process is to offer our assistance to schools in analyzing their required policies, or, in the event that their policy is not in final form, to offer technical assistance in its further development.

However, it is not my intention to dictate to schools what means they must employ to come into compliance with the Act. I will continue to suggest alternatives which they may consider or in some cases select or suggest alternative means for their consideration and leave final decision-making on the policy with the school.

While this approach to compliance, Mr. Chairman, has been greatly appreciated by those schools with which we have been involved in the complaint process, it has not been entirely free from problems. From my correspondence it seems that this approach is so unique for HEW and the Federal Government that some administrators have difficulty believing that we are serious. They have difficulty accepting our belief that our role is one of assisting them to make a decision which best meets their particular needs as opposed to the more classical role of the Federal Government telling them what will meet their needs.

I believe that so long as the means of implementation designed by institutions, functions in a way that ensures that the institution meets its responsibilities under the law while ensuring that the rights of parents and students are protected, the role of my office, as I have outlined it to you, is not only unique in its relationship between government and the people it serves, but I believe firmly that it is effective and efficient.

While the problem that I just mentioned is procedural, there are a few points that I believe need to be resolved in the months ahead. They are of a technical nature, and I don't want to go into them in detail now. I will be glad to mention them if time permits in the question and answer area.

Chairman **Perkins**. You are inserting all of this in the record?

Mr. **McFee**. Yes, sir. There are four areas: the disclosure to parents of dependent students, the problems with noncustodial parents access to their children's records, some continuing misinformation relating to the designation and release of directory information, and, last, the effect of the law on research activity. These are treated in considerable detail in my full testimony.

There are three other areas that are still giving us some problems: the law enforcement exemption, the misinformation, and the problems on the effects of the Act on detecting incidents of child abuse and neglect, and the treatment of medical records. We are receiving recommendations and comments in all these areas during our comment period. We are carefully reviewing the recommendations of the Privacy Protection Commission, and, in closing, I think

I would like to emphasize or re-emphasize my belief that the implementation of this Act is progressing smoothly. My experience has shown that the majority of institutions are moving rapidly to implement the law. Progress is greater among postsecondary schools than among elementary and secondary schools, but I have high hopes that with the upcoming school year, these schools will also come into compliance with the Act.

I thank you for your time, Mr. Chairman .

Chairman **Perkins**. Thank you very much. It was very good testimony.

STATEMENTS OF LOUIS D. HIGGS, DEPUTY EXECUTIVE DIRECTOR, PRIVACY PROTECTION STUDY COMMISSION; DANIEL STEINER, GENERAL COUNSEL, HARVARD UNIVERSITY; STAN SALETT, NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION; AND STEVE SCHIRLE, REPRESENTING ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA

Chairman **Perkins**. Mr. Louis Higgs, Deputy Executive Director, Privacy Protection Study Commission. Go ahead. Without objection, your prepared statement will be inserted in the record, and if you can summarize it, it will help us because the House is going in session pretty quick.

STATEMENT OF LOUIS D. HIGGS

Mr. **Higgs**. I will try to be as brief as I can. I am Louis D. Higgs, Deputy Executive Director of the Privacy Protection Study Commission.

I wish, first of all, to express the apology of Mr. David Linowes, Chairman, who had planned to be here in spite of a previous commitment in Sacramento yesterday, but he couldn't make it because of airline scheduling problems. You have his written testimony, and I will try briefly to summarize the major points.

[Mr. Linowes' statement follows:]

FOR RELEASE: 9:00 A.M., TUESDAY, AUGUST 2, 1977

Testimony of David F. Linowes
before the House Subcommittee on Elementary and Secondary
Education, August 2, 1977.

Mr. Chairman and members of the House Subcommittee on Elementary and Secondary Education, I am David F. Linowes, Chairman of the Privacy Protection Study Commission. With me today are Louis D. Higgs, Deputy Executive Director, and Christopher J. Vizas II, Special Staff Counsel. We appreciate this opportunity to discuss with the Subcommittee our findings and recommendations relative to the protections for personal privacy in educational record keeping under the Family Educational Rights and Privacy Act (FERPA).

My brief presentation this morning will summarize the Commission's findings and recommendations, after which my colleagues and I are prepared to respond to your questions.

The Commission included education records as part of its mandated study of the use of data banks and information systems in the public and private sectors of our society for three reasons: (1) the pervasiveness and growing importance of education records; (2) the history of public concern over questions of privacy and fairness in school records that culminated in passage of FERPA in 1974 (which concern our co-panelists from the National Committee for Citizens in Education did much to crystallize and articulate); and (3) the existence of FERPA itself, which, as a statutory model, offers an alternative to the omnibus approach to regulating record keeping taken by the Privacy Act of 1974. As you know, FERPA encompasses the same range of privacy and fairness concerns as the Privacy Act, but is targeted on education records, the individuals to whom they pertain, and the institutions that keep them. Unlike the Privacy Act, it does not levy a broad set of requirements on a diverse mix of records and record-keeping institutions. The Commission was interested not only in the degree to which individuals were protected under FERPA, but also in how effectively the targeted approach has achieved the desired balance among individual, institutional, and societal interests in education record keeping.

To evaluate the merits of FERPA as a privacy protection statute, the Commission held four days of public hearings, at which 56 witnesses testified. The witnesses represented parents, students, professional educators, administrators, and government agencies. At the time of the hearings, the final DHEW FERPA regulations had been in effect less than nine months, although the statute had been in force for almost two years; and many institutions were still developing or had only recently begun to implement their FERPA policies and procedures. Nonetheless, in the Commission's view the hearing testimony confirms the necessity and validity of most FERPA requirements.

Educational institutions at all levels are necessarily granted substantial authority over students and substantial freedom to gather and use information about them without their consent or the consent of their parents. This authority has traditionally carried with it the responsibilities of stewardship. But educational institutions have been subjected to unprecedented stresses stemming from population growth and mobility, greater breadth and specialization of knowledge, the need for professionalization and bureaucratization, and the expanding role of the Federal government in education. These stresses have, to varying degrees, caused institutional record-keeping interests to overshadow those of the individual. FERPA was a solid step toward restoring the proper balance between the interests of students and parents and the informational needs of educational institutions.

Although FERPA has had a rather stormy beginning, plagued by confusion, misunderstanding, defensiveness, and delay, the Commission found substantial support for its principles and most of its requirements among educators, parents, and students.

The Commission has also found that the strategy implicit in FERPA and strengthened by the intelligent and innovative approach of DHEW in carrying out its responsibilities under the Act -- a strategy we have labelled "enforced self-regulation" -- is becoming more widely understood, and as it becomes more widely understood, is being perceived as an effective tool for striking the desired balances. Enforced self-regulation places responsibility for developing and implementing policies and procedures that meet minimum legal requirements on the educational institutions themselves. It states objectives for local institutions but does not prescribe detailed substantive standards or impose fine-grained procedures. Rather, it relies on making an institution accountable to those whom it most directly affects, without requiring either prior Federal approval for local policies and procedures or systematic Federal monitoring of each institution's performance.

Further, although there have been some public claims of unreasonable costs attached to the implementation of FERPA requirements, the Commission received no documented evidence of such costs, and the only systematic analysis of costs provided to the Commission indicated that the initial costs for a major urban school district were about $1 per student, per year and given the flexibility FERPA allows, could be reduced without detriment to the individual student.

In general, then, the Commission's overall assessment of FERPA was highly favorable. However, the Commission also concluded that additional steps need to be taken to improve and strengthen the Act, and particularly to correct several serious gaps in its coverage. The Commission's approach to formulating stronger protections for the individual's interest in education records is not to limit the authority of educational institutions, but to strengthen the accountability of those institutions to the individual and to society. Our recommendations recognize that if students and parents are to be properly protected from intrusive or unfair practices in the collection, use, and dissemination of education records, educational institutions must bear a large part of the burden for protecting them. Our recommendations, therefore, seek to make educational institutions continually more aware of and responsive to their tradition of stewardship. We rely heavily on openness, both to dispel unfounded fears and to identify and resolve real problems. The Commission has made 15 specific recommendations that aim at the following objectives:

1) to expand and strengthen FERPA's minimum requirements;
2) to strengthen accountability by increasing local remedies and accountability and by

focusing Federal enforcement on systematic abuse and providing more effective Federal sanctions for such abuses; and

3) within that context of stronger minimum requirements and more effective accountability, to give each educational institution a more flexible hand in meeting its responsibilities and adapting them to local circumstances.

In achieving the first objective, the Commission, following the lead of the DHEW regulations, recommends that FERPA be amended to require educational institutions to formulate, adopt, and promulgate an affirmative policy to implement FERPA requirements. It further recommends that those requirements be expanded to obligate the institution to establish reasonable procedures to:

1) attend to the content and quality of the records it maintains on individuals;
2) provide redress for an individual when a decision has been based on a record subsequently found to be erroneous, misleading, or inappropriate; and
3) protect the rights of students whenever it permits or undertakes survey and other data collection activities.

The Act currently only provides for rights of access and correction, which the Commission feels are necessary but insufficient protections for the individual. They are, at best, remedial, not preventative. They do not address the problem of stigmatization that is particularly prevalent in elementary and secondary schools, and arises not so much from a particular item of information as from a composite impression that the record as a whole conveys. This often makes it difficult for a parent or student to know which items to correct or amend.

In addition, the recognition that intrusiveness in data collection is a major problem led to the enactment of FERPA and the responsibility of the institutions to protect the privacy of students in such data collection activities was recognized in the Act. Regulations specifying minimum requirements, however, have never been issued and thus the data collection problem, in effect, has not been addressed.

The Commission also recommends expanding FERPA to encompass records and record-keeping practices in two significant areas not currently covered by the Act:

1) The records and record-keeping practices of organizations such as the Educational Testing Service and the College Entrance Examination Board, which perform testing and data assembly-services for educational institutions and, in so doing, collect, maintain, and disseminate vast amounts of data on millions of individuals; and
2) the records of applicants for admission who do not subsequently matriculate and who have a strong interest in assuring that important decisions about them are being based on accurate, timely, complete, and relevant information.

In regard to the admissions process itself, the Commission has recommended that FERPA not allow letters of recommendation to be subject to formal waiver of the right of access, because the current waiver clause is, in effect, inconsistent with the spirit of FERPA and has had the effect of coercing students to waive their access right. The Commission believes that candor is a professional obligation that should not carry the price of secrecy or potential unfairness.

In meeting its second objective of strengthening institutional accountability, the Commission has recommended five steps to strengthen an institution's incentive to live up to its responsibilities. While FERPA currently allows substantial local discretion, it does not attempt to take full advantage of existing local accountability mechanisms to enforce institutional responsibility for fair and appropriate record-keeping practices. Three of the five recommended steps seek to focus the attention of these existing local mechanisms on record-keeping issues so that public pressure will encourage the development of acceptable standards and procedures to implement the minimum requirements of FERPA. The Commission recommends that FERPA require that instructional institutions provide for parent or student participation in the establishment and review of their policies and procedures; for procedures to challenge policies or practices; and for administrative sanctions for violations of its FERPA policies.

To strengthen local accountability in this way, the Commission believes that several major changes are necessary in the Federal enforcement role. It believes that DHEW should be reserved as a court of last resort for complaints of systematic institutional failure to comply with FERPA, and not relied upon either to redress individual injustices or to review or approve each local policy. Moreover, the Commission strongly approves the Department's current system of enforcement which, like compulsory arbitration, seeks to obtain voluntary compliance. We recognize, however, that the current sanction of total withdrawal of Federal funds is so disproportionate to the nature of FERPA violations that it lacks credibility as a threat and would be counterproductive if exercised. Therefore, the Commission recommends that FERPA be amended to provide that all or any portion of DHEW funds earmarked for education purposes may be withheld from an educational institution when its policy does not comply with FERPA requirements, or when evidence of systematic failure on its part to implement its policy is presented, but that the amount withheld should be appropriate to the nature of the violation. This, furthermore, is coupled with our recommendation that an individual be permitted to commence a civil action for injunctive relief against an institution that fails to provide him a right provided by FERPA.

The Commission's third objective was to give educational institutions a more flexible hand in meeting their obligations under FERPA. The Commission discovered a number of examples where FERPA is prescriptive rather than permissive, limiting the exercise of local discretion, particularly in regard to the disclosure of student records to third parties. In the Commission's judgment, the attempts in the Act to prescribe specific balances have created more problems than they solve, and the Commission's recommendations seek ways of giving educational institutions more responsibility for striking the balances between competing interests. These recommendations address five areas of disclosure: the so called "desk drawer" notes of teachers and administrators, directory information, and disclosure of student records to researchers, law enforcement agencies, and social service agencies.

The current FERPA provision prohibiting disclosure of desk drawer notes unless students can have access, can prove harmful to the student and may reduce the effectiveness of the educational program. Hence, the Commission recommends allowing those records to be shared for a temporary period without student access, unless they are used for making an administrative decision affecting the student, in which case the student would have access. The Commission's recommendation places specific emphasis on the desk drawer notes of disciplinary officials, which has been the major area of complaint.

FERPA allows schools to create a category of records about the identity or status of an individual, called directory information, that is freely available to the public. However, it then allows students to prohibit disclosure without the student's permission of any category so defined. The Commission has found that such a procedure is costly to the institution, to the press, and to other institutions who need to verify information. It also provides little real protection for the individual. Thus, the Commission recommends that students not be able to prohibit disclosure of "directory information," except for address and phone number.

Use of school records for research and statistical purposes currently provides a problem under FERPA, since the Act is permissive and provides little assistance to schools for resisting increasing demands for access, particularly from Federally funded researchers. The Commission has recommended in its research and statistics study, a standard set of conditions for the disclosure of administrative records; be they medical, welfare, or social services records, which it believes should be applied to education records. These rules give the school authorities more control over the conditions of disclosure through the requirement of a written disclosure agreement.

Any school or school district is a microcosm of the community in which it exists and hence, to the degree that juvenile crime, social conflict, drug and child abuse, and other social problems exist in the communities, schools have to deal with them alone and in cooperation with other community institutions with whom they share responsibility for the welfare of the child. Hence, exchange of information between schools and social service and juvenile justice agencies has increased significantly over the years. This exchange has been a source of many benefits to the individual and to the service institutions and also a source of real and potential harm. FERPA attempted to strike the specific balance in these complex relationships by essentially cutting off the flow of information without student or parental consent, or some compulsory legal action. In light of the Commission's recommendations for stronger accountability structures, the Commission has recommended that educational institutions be allowed to establish policies that allow disclosures on a routine basis, without student or parental consent, to social service agencies for specified purposes that assist the schools in meeting their responsibilities to the child. In similar fashion, it is recommending that school officials be allowed to disclose information to law enforcement agencies in cases where on-going violations of law threaten the welfare of the institution — or its students or faculty; for example, in cases of drug sales, gang warfare, or extortion rings within the school. The Commission realizes that this is an area of potential abuse, thus its recommendations include public reporting requirements for these cases.

Finally, the Commission has paid special attention to the very difficult problem of record sharing between school officials and school law enforcement units. Under FERPA, if an educational institution and its law enforcement unit share any records, all the records of the law enforcement unit become subject to the access provisions of the Act. The Commission believes that a law enforcement unit of an educational institution should be allowed to exchange information with the rest of the educational institution without making its law enforcement records subject to FERPA. At the same time, educational institutions should be able to share education records, including disciplinary records, with their law enforcement units, only to the same extent they can share such records with other law enforcement agencies. Thus, it has recommended changing the Act to achieve those objectives.

These are the Commission's recommendations for strengthening the protections of FERPA. Our report also points out several unnecessary administrative burdens that DHEW could remove through changes in the regulations. We also encourage DHEW to take a more active role in providing technical assistance to educational institutions to facilitate and expedite the development and implementation of such policies; and we encourage this Committee to give serious consideration to any such assistance programs that DHEW might propose.

That concludes my prepared remarks. I and my colleagues stand ready to answer any questions you may have.

Mr. HIGGS. We included education records in our mandated study (see Appendix 3) for three reasons: the pervasiveness and growing importance of education records; the history of public concern over questions of privacy and fairness in school records that led to the passage of FERPA in 1974, and the existence of FERPA, itself.

Our study included four days of public hearings, at which 56 witnesses, representing parent groups, student groups, professional educators and administrators and government agencies provided both oral and written testimony. That testimony, in our judgment, confirmed the necessity and validity of most FERPA requirements.

Educational institutions at all levels are necessarily granted substantial authority over students and substantial freedom to gather and use information about them without their consent or the consent of their parents. This authority has traditionally carried with it the responsibilities of stewardship. But educational institutions have been subjected over the past 20 years to unprecedented stresses stemming from population growth and mobility, greater breadth and specialization of knowledge, the need for professionalization and bureaucratization, and the expanding role of the Federal Government in education. These stresses have, to varying degrees, caused institutional record-keeping interests to overshadow those of the individual. FERPA was a solid step toward restoring the proper balance between the interests of students and parents and the informational needs of educational institutions.

In spite of FERPA's ambiguous and confusing beginning and the tremendous misinformation, as Mr. McFee pointed out, which began to circulate, the Commission found substantial support for the principles and most of the requirements among educators in both higher and elementary and secondary education, among parents and among students. It also found growing understanding of and support for the strategy implicit in the Act and fairly explicit in the Department of Health, Education and Welfare interpretation of the Act, which strategy we have labeled "enforced self-regulation" and for which I think HEW deserves a great deal of credit. This strategy essentially places responsibility on the educational institutions themselves for developing policies and procedures to meet minimum legal requirements. Those requirements state objectives and do not prescribe detailed substantive standards or fine-grained procedures. The strategy relies on making institutions accountable to those directly affected without requiring either Federal approval of local policies and procedures or systematic Federal monitoring of each institution's performance.

We also concluded, however, that additional steps needed to be taken to improve the Act. Our approach was not to limit the authority of institutions, but rather because we realize that educational institutions must inevitably bear a large part of the burden of protecting the students, to strengthen their accountability to the students and to the society, and we rely heavily on openness to dispel unfounded fears, identify and solve problems, and to make educational institutions continually more aware of and responsive to their tradition of stewardship.

Our 15 recommendations aim at three objectives—to expand and strengthen FERPA's minimum requirements; to strengthen accountability by increasing local remedies and local accountability, and then by focusing Federal enforcement on systematic abuse; finally, given those stronger minimum requirements and more effective accountability, to try to increase the flexibility of institutions in meeting those requirements and adapting them to local circumstances.

If I may, I will briefly summarize what we are concerned about in those recommendations. Number one is that Act places almost its entire burden on individual students and parents being able to protect themselves; and record-keeping particularly in elementary and secondary schools, simply is not well enough organized to enable access and correction to prevent the kind of abuses which occur; so we think that educational institutions ought to be asked to develop reasonable procedures to ensure the quality of their records, their accuracy, timelessness and relevance. That is the most important.

Second, the Act, while it recognizes local accountability, doesn't strengthen it, and we think it should require participation in the creation and monitoring of FERPA policy which the schools are required to have, particularly the right to challenge those policies. Third, that it ought to be expanded to include two areas that it does currently not cover. One such area is testing and data assembly services, such as the Educational Testing Service and the College Entrance Examination Boards which keep records on students and are not covered by the Act. We recommend they be covered. The second area, and one which is a very difficult area, is the area of admissions records, where the records of applicants who do not matriculate, are not now covered. It is a very difficult decision process for the institutions of higher education to choose people to go into law and medical school, but now applicants have no rights to ensure that their records are at least accurate and timely.

Third, we are asking——

Chairman PERKINS. You are not in any way insinuating that the grades, which are placed in the records are in any way tampered with?

Mr. HIGGS. No; the point is, Mr. Chairman, that third-party information is normally submitted in the applications process—letters of recommendation, for example.

Chairman PERKINS. And the students all know the grades at the time?

Mr. HIGGS. Oh, yes.

Chairman PERKINS. And the Buckley amendment would just, of course, open the thing up wider so that students and parents have access to all the materials in those files.

Mr. HIGGS. The problem is that a student who applies to the University of Missouri Medical School, for example, under Buckley, has no right to see those application records, nor to correct or amend them. And those records would include not just his grades from college or his ETS scores, but they would include interviews which have been made as part of the process; they would include letters of recommendation, and so forth. And so it is a very important decision for those students and an area where they simply do not have the same access to those files which the Buckley amendment provides for students to their files.

Chairman PERKINS. Do you think we should broaden it?

Mr. HIGGS. Yes, sir. We believe that Buckley should be applied to the records of applicants for admission; yes.

Mr. GOODLING. What happens in the case that now counselors in many instances refuse to write letters of recommendation because they know they are going to be read?

Mr. HIGGS. This is another area we took on, and I think the higher education community is going to be disturbed by the recommendations, or at least some of them will. The letters of recommendation is a tough issue, and right now the Act has a waiver. We have evidence in our testimony that the waiver is, in effect, being used to coerce students to waive. The professionals feel they need confidentiality in order to be candid. The only studies on this show that whether or not the letters of recommendation were open, didn't affect the contents, but I wouldn't want to press the reliability of that study. It is just an indication.

Certainly the academic community is very sensitive to it. The testimony on the other side says it really doesn't make a difference. If a man wants to write a bad letter, he puts it in good language and kills with kindness, not viciousness, and, in effect, that most faculties will not write a letter if they are going to really send derogatory information. They simply will tell the student, no, giving one reason or another.

But there is indication that pressure has been put on students to waive their rights and the Commission's position is that if the price of candor is secrecy, maybe the price is too high. So we are recommending that a student not be allowed to formally waive his right, although he need not exercise it and may make whatever agreement he would with the individual faculty member but the educational institution could not provide forms or provide pressure. The Act explicitly prohibits pressure, but the evidence is that there is a lot of pressure on the students to waive their rights to see those letters of recommendation.

We found very much confirming evidence of Mr. McFee's testimony on the strategy that the DHEW approach of being a court of last resort for complaints about systematic institutional failure is important. We feel that the sanction of total withdrawal of Federal funds is simply not credible, and we feel that that ought to be expanded so that HEW would be able to withhold any or all funds proportionate to the nature of the offense.

Finally, we think that HEW is not a very good tool for the remedy of individual injustices, and we feel that a citizen should be able to seek civil action for injunctive relief. Most of the abuses occur not at the policy level, but at the operational level in given schools within large districts.

Chairman Perkins. You know, I am a little worried when the Privacy Commission proposes an amendment whereby a student or parent or guardian could file a civil suit against the educational agency and someone else would pay the cost. I would hope we would never agree to this. The 1974 law requires a plan to be adopted and approved and Federal funds cut off if not implemented.

I see no need to take it into the courts. I will tell you why. Condemnation cases down my way are pending by the thousands, and you are not going to do anything except clutter the courts up, and then they may get relief two or three years after that. If we can't do this job administratively, you people should step out or somebody else take your place, or somebody else should take the place at the higher educational institutions. It is just that simple.

We can write laws without getting everybody here in court, I think. If we can't, we are derelict, and you people certainly are derelict if we can't straighten out this little problem without suggesting lawsuits. That is all I have to say about it.

Go ahead with the next witness. Mr. Daniel Steiner, General Counsel, Harvard University.

STATEMENT OF DANIEL STEINER

Mr. Steiner. Thank you, Mr. Chairman.

Chairman Perkins. Every way I see, we are wanting to go into court any more, and you can't get a case tried in five or six years. Go ahead.

Mr. **Steiner**. That is the way it is in the Federal District Court in Boston, Mr. Chairman; the backlog that exists there.

Chairman **Perkins**. About five or six years?

Mr. **Steiner**. That is right. I would also say we were sued on the day the Buckley amendment became effective in the Federal District Court in Boston.

Chairman **Perkins**. I think there is some way to simplify this thing, I really do, to give everybody their rights. I don't want anybody deprived of a legal right. There should be a remedy in court. But here there is no earthly excuse in the world to deprive anybody of a legal right. We can penalize through our own legislative enactments, through the Office of Education, people who will disobey the law, and I think that is really the way to approach this thing instead of cluttering all the dockets up in the world.

Go ahead.

Mr. **Steiner**. Thank you, Mr. Chairman. I would like to hit the high spots, if you will, of my testimony.

Chairman **Perkins**. Without objection, your prepared statement will be inserted in the record.

[The statement of Daniel Steiner follows:]

HOUSE OF REPRESENTATIVES

COMMITTEE ON EDUCATION AND LABOR

SUBCOMMITTEE ON PRIMARY, SECONDARY AND

VOCATIONAL EDUCATION

STATEMENT OF DANIEL STEINER

GENERAL COUNSEL, HARVARD UNIVERSITY

August 2, 1977

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify today on the Family Educational Rights and Privacy Act, more commonly known as the Buckley Amendment. These oversight hearings are particularly welcome because they provide, I believe, the first opportunity for formal testimony before the Congress on the Amendment, which originated on the floor of the Senate and was enacted without the benefit of hearings. I shall use this opportunity, therefore, to raise some serious issues insofar as the Amendment affects higher education in general and Harvard University in particular. I will also comment briefly on the recommendations of the Privacy Protection Study Commission.

Any consideration of the recommendations of the Privacy Protection Study Commission should begin with an examination of the Buckley Amendment itself. The recommendations seek to build upon the foundation laid in the original legislation and are an extension of the premises upon which that legislation was based. Only if those premises represent sound public policy and only if the Buckley Amendment on close examination proves to have been a wise exercise of the power of the federal government do the imposition of further restrictions on colleges and universities warrant serious consideration.

The Buckley Amendment probably would not have become law insofar as higher education is concerned had there been opportunity for Congressional hearings and full consideration by the Congress. The legislation was initially drafted to apply to primary and secondary educational institutions because there was some indication that there was a need for the legislation for such institutions. Coverage of institutions of higher education was added as an afterthought with no evidence that there was any need for the legislation. As originally enacted, the legislation had serious defects when applied to colleges and universities, and within two months of its effective date, the Congress passed corrective amendments.

Even with these changes the Buckley Amendment represents an unwise exercise of federal power, and any effort to extend its reach should be subject to the most careful scrutiny. We take this position not because we do not respect the privacy of students, which we have done for many years prior to the legislation, or because our student files contain damaging information that we are unwilling to disclose to students. I shall state, as briefly as possible, three reasons for our position.

First, the Amendment affects significantly and uniformly the internal affairs of almost all institutions of higher education in the United States, be they two year junior colleges or major research institutions. By definition any such intervention raises very serious policy questions because the diversity and relative autonomy of universities in the United States have been important factors in the development of what is generally recognized to be the best system of higher education in the world. Few areas of human endeavor are cloaked with more uncertainty and difficult questions than higher education. Our institutions, with all their faults, have flourished in part because our society has allowed broad latitude for different approaches and in the main left decisions to faculty and administrators whose lives are devoted to the educational process. The Buckley Amendment cuts sharply into this diversity and autonomy---with no evidence of any need for this drastic intervention.

Second, the Amendment adversely affects the educational process at institutions such as Harvard. The ultimate losers are, of course, the students, the very group the Amendment was designed to protect. Let me illustrate this point with a few examples drawn from consideration of the Amendment's effect on undergraduate education at Harvard.

Central to undergraduate education is the admissions process. Each year Harvard has about six or seven applicants for each place in the entering class. In reaching admissions decisions, the Committee on Admissions has not simply relied on the test scores and grades but has tried to assess carefully and in depth the strengths and weaknesses of each applicant. Such a system is heavily dependent upon frank letters of recommendation from secondary school teachers and administrators and from a network of alumni interviewers around the country.

The predictable and actual effect of the Buckley Amendment has been that unless an applicant has waived his right to see the letter, letters of recommendation tend to be bland and thus of little utility. The Committee on Admissions frequently no longer receives evaluations that may be critical in reaching a decision to accept or reject an applicant.

Similarly, we now know less about students whom we have admitted, and under the Buckley Amendment letters of recommendation when the student has waived his right to see them may be used only by the admissions office. The net effect of smaller knowledge of the admitted students and the restriction on the use of letters is that college officials reach less informed decisions affecting students. Consider, for example, the assignment of roommates and freshman advisors. In both cases the more the Freshman Dean's Office knows about the student the wiser the decisions are likely to be. Comparably, the advisor who works with the freshman during what for many students is a difficult year of adjustment knows much less about the student.

It may be helpful, I believe, to the Subcommittee to have an example of the kind of information that is useful to a Committee on Admissions, a Freshman Dean's Office and an advisor. Attached to this statement are two letters of recommendation that were submitted on a waived basis (facts that could identify the student have been changed.) Both talk frankly about the student in a way that enables the reader to distinguish him as an individual, and present his weaknesses as well as his strengths. According to our Dean of Admissions, no letter to which a student had access would speak so frankly. Although the student was admitted, because of the Buckley Amendment the letters could not be given to the Freshman Dean's Office or his advisor. It is clear that the information in the letters would enable a conscientious college official to serve the student better, especially if the student had problems during his first year.

The Buckley Amendment affects in a comparable manner the entire undergraduate experience. Advisors and tutors reports and evaluations by faculty tend to be much less useful. Files are more sterile, giving little sense of the student as a unique individual. A reader of the file, who may be trying to counsel the student on academic problems or write a letter of recommendation for admission to a graduate school, gains little sense of the development of the student and his trials and triumphs from his high school days through his senior year at college. The file today is most likely to be a collection of A's and B's and some C's, some reports indicating that the student attended his tutorial sessions quite regularly and that most of his papers were well written, and a note that he missed his French examination because he had the flu. In a large institution such as Harvard, where records had played an important role in helping students, the Buckley Amendment has weakened the educational process.

Finally, the Buckley Amendment has imposed significant costs upon institutions and is unlikely to achieve its objectives. The costs are of two kinds. First, there is the considerable time and money that has been spent and continues to be spent in implementing and administering the Amendment. Administrators and faculty members in nine Harvard faculties have spent countless hours in seeking to understand a complex law and to apply it to the varying circumstances in each of the faculties. Were these hours well spent when no problem had been identified that needed correction? We think not. Second, there has been a considerable intangible cost. A federal law has supplanted self-governance at Harvard and other institutions. Policies and procedures that formerly were resolved collegially are now frequently resolved by reference to my office. Students and faculty must do things that seem foolish to them (for example, when a student applying to a graduate school asks a faculty member to write a letter of recommendation, the faculty member must then ask the student to sign a form giving his written consent to the faculty member to put information about him in the letter). The oppressive weight of bureaucracy is keenly felt.

Has the Buckley Amendment achieved its goals? It is unlikely, in my view. Although HEW has tried to be helpful in providing guidance and answering questions. the law on its face is very complex, and its application to a wide variety of circumstances in diverse institutions of higher education presents additional problems. In an era of financial stringency, it is doubtful that a majority of institutions of higher education have the human resources, and money for legal fees, needed to come into full compliance with the Buckley Amendment and to monitor compliance on an on-going basis. The report of the Commission indicates that compliance has been limited. Moreover, it is known that in many situations people have substituted telephone calls for the written communication to which the student would have access. The telephone call with no memorandum of conversation for a file avoids a major thrust of the Buckley Amendment, and at the same time leads to hearsay reports of oral communications. The student does not benefit from resort to the telephone.

Harvard, therefore, would oppose the legislative enactment of those recommendations of the Privacy Protection Study Commission that involve an extension of the reach of the Buckley Amendment. Two of the recommendations are of particular concern.

One would broaden the definition of "student" to include applicants for student status (Recommendation (4)(a)). It is predictable that such a change would impose a costly administrative burden on institutions such as Harvard and would accomplish very little. In highly competitive admissions situations, experience has shown that applicants and their parents are frequently concerned that the application file is complete. In practice, Harvard will notify applicants if material is missing, but this fact does not prevent a barrage of phone calls and letters. The proposed change would allow requests for complete copies of the admissions file during the admissions process. Similarly, rejected applicants could request copies and finding no adverse and unknown facts, would enter into debates orally or in writing with the admissions staff. Such debates are likely to be time consuming and sterile. Almost all applicants are rejected not because of adverse facts but because the Committee on Admissions deemed other candidates stronger. The net result of the proposed change would be little if any additional protection for the applicant but higher application fees to cover the additional costs of running the admissions office.

The other recommendation is (5), which would remove the right to waive access to letters of recommendation. This recommendation, for reasons stated above, would mean the end of what we consider to be a sensible system of admissions. It would compel increased reliance on grades and standardized tests, which are useful but recognized to have many limitations. Outside of the admissions area, elimination of the waiver provision would adversely affect the job placement system for students receiving their doctoral degrees. Letters would lose their value, and telephone calls, with all the shortcomings of oral communications, would provide the basis for decisions. Unless there is compelling evidence to suggest that such a change is absolutely necessary, we would urge that the provision permitting waivers remain intact.

In regard to the other recommendations that impose additional requirements, there is no doubt that they would lead to increased bureaucracy and would require the expenditure of additional money and considerable amounts of time of faculty and administrators, money and time that should be devoted to the pressing and real, rather than imagined problems of colleges and universities. As when the Amendment was originally enacted, the Commission presents no persuasive evidence of abuses or problems that require new restrictions. The justifications seem to us to be ideological and theoretical.

Some of the recommendations make very little or no sense when applied to an institution such as Harvard. For example, Recommendation (2)(c) seems to say that if the Dean of Harvard College wants to survey students on the effectiveness of the advising system, he must first have the survey reviewed and approved by the University and then reviewed by the students. What purpose is served by requiring these steps for our many internal surveys on educational matters? A student is never required to answer a survey if he doesn't want to for any reason. Or consider Recommendation (4)(c), which requires destruction of records of rejected applicants after 18 months. This provision both conflicts with Massachusetts anti-discrimination regulations and creates problems in handling applications of rejected applicants who apply a few years later either as first-year or transfer students.

The underlying question, of course, is not whether waivers should or should not be permitted or whether or not colleges and universities should adopt more procedures as recommended by the Privacy Protection Study Commission. The first question that should be asked is whether such issues should be resolved nationally by the United States Congress or should be resolved on campuses in accordance with the educational needs and objectives of individual institutions. We submit that an enormous burden of proof rests on those who urge the Congress to continue to reach decisions on matters that should be resolved by colleges and universities.

HARVARD-RADCLIFFE
Office of Admissions and Financial Aids
Byerly Hall
8 Garden Street
Cambridge, Massachusetts 02138
Phone: 617-495-1551

TEACHER REPORT

This form is valid for entrance in
September 1977 only.
Due Dates: November 30, 1976, for Early Action
January 15, 1977, Application Deadline

Applicant's Name: Randolph, John --
Last First Middle Initial

To the Applicant: After you have completed the three lines below please read carefully the statement regarding the Family Educational Rights and Privacy Act of 1974, circle the response you wish to make, date it, and sign your name.

Name of Applicant: RANDOLPH, John -
Last First Middle

Home Address: 17 Crystal Circle, Cambridge, MA 02138
Street Address City or Town State Zip Code

Secondary School: Lockhill High School, Cambridge, MA 02138
Official Name City or Town State Zip Code

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

Under the provisions of this Act you have the right, if you enroll at Harvard or Radcliffe, to review your educational records. The Act further provides that you may waive your right to see recommendations for admission. Please indicate below by circling the appropriate phrase and signing your name whether or not you wish to waive this right.

I [✓ waive] do not waive any right of access that I may have to this recommendation form.

Applicant's signature s/ John Randolph

Date December 14, 1976

You should give this form, along with a stamped envelope addressed to Harvard and Radcliffe Admissions, Byerly Hall, 8 Garden Street, Cambridge, Massachusetts 02138 to a teacher who knows you well.

To the Teacher: This individual is applying for admission to Harvard or Radcliffe. We have requested that the applicant indicate above his or her wishes regarding the Family Educational Rights and Privacy Act of 1974. Your candid estimate of his or her academic performance, intellectual promise, and qualities as a person will help the Admissions Committee in making final selections of the coming year's entering class. Your report will be handled with great care; it will be read initially by three admission officers and later will be reviewed by the Admissions Committee as it votes on the student's case.

NOTE: The following questions are intended merely as guidelines. We are much more interested in a complete report of whatever you deem important than in a specific format. If you would prefer to send your report in another form (for example, a letter or mimeographed summary), please feel free to do so, but you should attach it to this form. Please do not hesitate to contact us if we can be of assistance to you. Thank you for your help.

1. How long have you known the applicant? 3 years
2. In what subject(s) have you taught him or her? Spanish
3. What was the applicant's grade in your course(s)? B 12th year A 11th year B Other (specify)
4. Please tell us what you can about his or her intellectual qualities and academic work. We are interested in any evidence you can give us about the nature of the applicant's motivation for academic work, the breadth and depth of the applicant's intellectual interests, the originality, independence, sensitivity, and power of the applicant's mind, and the applicant's capacity for growth. Is he or she, for instance, excessively grade-conscious or driven by family pressure? Does the applicant have to be nursed or prodded? To what extent has he or she been genuinely interested in academic work and made full use of intellectual potential?

John is a diligent, conscientious student, self-motivated. He seeks to learn reasons and is careful with details. He is concerned about grades, but takes a poor grade as indication that he must work harder---and does. He is intellectually curious and strives for answers when he has not got the correct answer, and looks for the reasons why he has not.

(OVER)

(over)

5. What is the quality of the applicant's performance in extracurricular, community, or work activity? Does he or she have any unusual competence, talent, or capacity for leadership?

John is not a leader, He does not have the ability to inspire others to follow. He is independent in his thinking and actions.

6. What are your impressions of the applicant's character, aims and values? How do fellow students, teachers, and you regard him or her as a person compared with contemporaries? Does the applicant have any special strengths, weaknesses, or problems of which we should be aware? What are the first few words which come to your mind to describe his or her personality?

He is a loner. He likes the approval of others but will oppose others when he thinks they are wrong.

During his freshman and sophomore years he had difficulty relating to his fellow students. Some of the cruder among them loved to tease him because of the emotional reaction they could evoke. He has now largely overcome this problem and is not now so sensitive to crude jokes. He has learned to control the expression of his emotions admirably.

7. Are there any special or unusual circumstances, background information, or other factors (positive or negative) which may be relevant to the applicant's performance in school or to the Admissions Committee's over-all consideration of his or her case?

8. Would you care to make any additional comments? For example, do you wish to elaborate on your reasons for checking the boxes below as you did or, if appropriate, compare the applicant with other students who have gone to Harvard or Radcliffe or similar colleges from your school?

As John has overcome his earlier emotional problems, he has improved in his academic performance and in his relations with his fellow students. I think he has fine potential, and the improvement should continue.

9. How would you compare the applicant to his or her entire class? (Please check the single most appropriate box.)

	Average or Below	Good (above average)	Excellent (next 10% this year)	Outstanding (top 5% this year)	One of the top few I have ever encountered in my career
academically:	☐	☐	☒	☐	☐
character and personal qualities:	☐	☐	☒	☐	☐
over-all:	☐	☐	☒	☐	☐

Date 12-15-76 (Signed) s/ Shirley Frye Teacher

Please Print Name Shirley Frye School Lockhill High School

HARVARD-RADCLIFFE

Office of Admissions and Financial Aids
Byerly Hall
8 Garden Street
Cambridge, Massachusetts 02138
Phone: 617-495-1551

TEACHER REPORT

This form is valid for entrance in
September 1977 only.
Due Dates: November 10, 1976, for Early Action
January 15, 1977, Application Deadline

Applicant's Name: RANDOLPH, (Last) JOHN (First) (Middle Initial)

To the Applicant: After you have completed the three lines below please read carefully the statement regarding the Family Educational Rights and Privacy Act of 1974, circle the response you wish to make, date it, and sign your name.

Name of Applicant RANDOLPH, (Last) John (First) - (Middle)
Home Address 17 Crystal Circle, (Street Address) Cambridge, (City or Town) MA (State) 02138 (Zip Code)
Secondary School Lockhill High School, (Official Name) Cambridge, (City or Town) MA (State) 02138 (Zip Code)

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

Under the provisions of this Act you have the right, if you enroll at Harvard or Radcliffe, to review your educational records. The Act further provides that you may waive your right to see recommendations for admission. Please indicate below by circling the appropriate phrase and signing your name whether or not you wish to waive this right.

I [✓ waive] do not waive any right of access that I may have to this recommendation form.

Applicant's signature s/ John Randolph

Date December 14, 1976

You should give this form, along with a stamped envelope addressed to Harvard and Radcliffe Admissions, Byerly Hall, 8 Garden Street, Cambridge, Massachusetts 02138 to a teacher who knows you well.

To the Teacher: This individual is applying for admission to Harvard or Radcliffe. We have requested that the applicant indicate above his or her wishes regarding the Family Educational Rights and Privacy Act of 1974. Your candid estimate of his or her academic performance, intellectual promise, and qualities as a person will help the Admissions Committee in making final selections of the coming year's entering class. Your report will be handled with great care; it will be read initially by three admission officers and later will be reviewed by the Admissions Committee as it votes on the student's case.

NOTE: The following questions are intended merely as guidelines. We are much more interested in a complete report of whatever you deem important than in a specific format. If you would prefer to send your report in another form (for example, a letter or mimeographed summary), please feel free to do so, but you should attach it to this form. Please do not hesitate to contact us if we can be of assistance to you. Thank you for your help.

1. How long have you known the applicant? 2 years
2. In what subject(s) have you taught him or her? English
3. What was the applicant's grade in your course(s)? ________ 12th year B 11th year B+ Other (specify)
4. Please tell us what you can about his or her intellectual qualities and academic work. We are interested in any evidence you can give us about the nature of the applicant's motivation for academic work, the breadth and depth of the applicant's intellectual interests, the originality, independence, sensitivity, and power of the applicant's mind, and the applicant's capacity for growth. Is he or she, for instance, excessively grade-conscious or driven by family pressure? Does the applicant have to be nursed or prodded? To what extent has he or she been genuinely interested in academic work and made full use of intellectual potential?

John is an able student and quite capable of analytical and critical thought. His academic work is correct, handed in promptly and shows signs of uncommon insight. He is grade conscious but not excessively so--however, it is one of his motivating forces. He does not have to be nursed or prodded but he does like a structured format.

(over)

(OVER)

5. What is the quality of the applicant's performance in extracurricular, community, or work activity? Does he or she have any unusual competence, talent, or capacity for leadership?

I am not familiar with his work outside the classroom other than to note that he is a member of the National Honor Society which requires that a student be active in school affairs.

6. What are your impressions of the applicant's character, aims and values? How do fellow students, teachers, and you regard him or her as a person compared with contemporaries? Does the applicant have any special strengths, weaknesses, or problems of which we should be aware? What are the first few words which come to your mind to describe his or her personality?

John has great personal integrity. He does not cheat, lie or begrudge others their higher achievements. He wants justice done and will ask for a review of a test grade for himself or for another he feels was mis-marked. He is considered a "character" or eccentric because of his abruptness. He says what is on his mind without too much tact and his social graces and poise are in need of improvement. He is laughed at for his abruptness, but respected for his intellect and openness.

7. Are there any special or unusual circumstances, background information, or other factors (positive or negative) which may be relevant to the applicant's performance in school or to the Admissions Committee's over-all consideration of his or her case?

He operated successfully in school where the enrollment is predominantly a minority group with emphasis on athletics and social performance and not on academics. Yet, John is accepted by his peers and performs well outside their values.

8. Would you care to make any additional comments? For example, do you wish to elaborate on your reasons for checking the boxes below as you did or, if appropriate, compare the applicant with other students who have gone to Harvard or Radcliffe or similar colleges from your school?

I marked "GOOD" for character and personal qualities because his integrity and concern for others are outstanding but his tactlessness and some behavior patterns (such as easy tears in times of stress) make him less than, or at least not in the ordinary straight category of either excellent or outstanding.

9. How would you compare the applicant to his or her entire class? (Please check the *single* most appropriate box.)

	Average or Below	Good (above average)	Excellent (next 10% this year)	Outstanding (top 5% this year)	One of the top few I have ever encountered in my career
academically:	☐	☐	☐	☒	☐
character and personal qualities:	☐	☒	☐	☐	☐
over-all:	☐	☐	☒	☐	☐

Date 12-14-76 (Signed) s/ Jennifer Rogers Teacher

Please Print Name Jennifer Rogers School Lockhill High School

Mr. **Steiner**. Any consideration, I believe, of the recommendations of the Privacy Protection Study Commission should begin with an examination of the Buckley amendment, itself. The recommendations seek to build upon the foundation laid in the original legislation and are an extension of the premises upon which that legislation was based. Only if the premises of the Buckley amendment represent sound public policy and only if it appears on close examination that the Buckley amendment is a wise exercise of the power of the Federal Government, do we believe that the imposition of further restrictions on colleges and universities warrant serious consideration and my comments will be limited to colleges and universities.

The Buckley amendment probably would not have become law insofar as higher education is concerned had there been opportunity for congressional hearings and full consideration by the Congress. The legislation was initially drafted to apply only to primary and secondary educational institutions because there was some indication that there was a need for the legislation for such institutions.

Coverage of institutions of higher education was added as an afterthought with no evidence that there was any need for the legislation. As originally enacted, the legislation had serious defects when applied to colleges and universities, and within two months of its effective date, the Congress passed corrective amendments.

Even with these changes, the Buckley amendment, in our view, represents an unwise exercise of Federal power, and any effort to extend its reach should be subject to the most careful scrutiny. We take this position not because we do not respect the privacy of students, which we have done for many years prior to the legislation, or because our student files contain damaging information that we are unwilling to disclose to students. I shall state, as briefly as possible, three reasons for our position.

First, the amendment affects significantly and uniformly the internal affairs of almost all institutions of higher education in the United States, be they 2-year junior colleges or major research institutions. By definition any such intervention raises very serious policy questions because the diversity and relative autonomy of universities in the United States have been important factors in the development of what is generally recognized to be the best system of higher education in the world.

Few areas of human endeavor are cloaked with more uncertainty and difficult questions than higher education. Our institutions, with all their faults, have flourished in part because our society has allowed broad latitude for different approaches and in the main left decisions to faculty and administrators whose lives are devoted to the educational process. The Buckley amendment cuts sharply into this diversity and autonomy, with no evidence of any need for this drastic intervention.

Second, the amendment adversely affects the educational process at institutions such as Harvard. The ultimate losers are, of course, the students, the very group the amendment was designed to protect. Let me illustrate this point with a few examples drawn from consideration of the amendment's effect on undergraduate education at Harvard.

Central to undergraduate education is the admissions process. Each year Harvard has about six or seven applicants for each place in the entering class. In reaching admissions decisions, the Committee on Admissions has not simply relied on the test scores and grades but has tried to assess carefully and in depth the strengths and weaknesses of each applicant. Such a system is heavily dependent upon frank letters of recommendation from secondary school teachers and administrators and from a network of alumni interviewers around the country.

The predictable and actual effect of the Buckley amendment has been that unless an applicant has waived his right to see the letter, letters of recommendation tend to be bland and thus of little utility. The Committee on Admissions fequently no longer receives evaulations that may be critical in reaching a decision to accept or reject an applicant.

Similarly, we know less about students whom we have admitted, and, under the Buckley amendment, letters of recommendation when the student has waived his right to see them may be used only by the admissions office. The net effect of smaller knowledge of the admitted students and the restriction on the use of letters is that college officials reach less informed decisions affecting students.

Consider, for example, the assignment of roommates and freshman advisers, an important process for the incoming freshmen at Harvard. In both cases the more the Freshman Dean's Office knows about the student, the wiser the decisions are likely to be. Comparably, the adviser who works with the freshman during what for many students is a difficult year of adjustment knows much less about the student.

I have attached to my statement two examples of letters of recommendation where the student waived his rights, to give you some idea as to the kind of information that we find we are not getting without waivers. I would emphasize that it is not a question of getting adverse information, of getting hard facts that are negative. We are really not concerned about that. Very few admission decisions are affected by that kind of information. It really is a question of getting a frank evaluation of strengths and weaknesses.

No individual is perfect who is likely to apply, and people are much less likely to be frank in enabling us to distinguish people as unique individuals without waivers of the right to see the letters.

Chairman PERKINS. Is your institution reluctant for the students to see the letters, and do you more or less insist that they waive that right to see the complete records? Has your institution, since we adopted this amendment, ever led the student to believe that he should waive his rights to see the records?

Mr. STEINER. We have, as an institution, put it as a neutral choice that is available to the student. Pragmatically, many students believe that a confidential letter of recommendation is likely to receive more weight. If they are applying to medical school, which is a highly competitive situation, as you know, without any form of coercion, a student is likely to reach the individual judgment, and I think correctly so, that a letter of recommendation, when the right to see it is waived, is likely to be franker and of more use to an admissions committee.

So I don't think it is a question of coercion, but of students properly evaluating what the weight is that will be given.

Chairman **Perkins**. When the student properly evaluates the situation and elects not to waive his right and reads the confidential information, will the admission board—say that student applied for medical school—know that the student has read the confidential information in the letter? Why should the admission board know anything about that?

Mr. **Steiner**. Well, one reason they are likely to know, sir, would have to know, is if the student is admitted, then if the right to see it has not been waived, the student would have access to it. If the right to see it has been waived, the student would not have access to it, and this is one of the series of administrative steps in the form that are required under the Buckley amendment because of that particular point. So that is why the letter of recommendation itself, the forms that we use, indicate clearly on their face whether or not the student has waived the right to see it.

My final point on the support of our basic position is that the Buckley amendment has imposed significant costs on institutions and I think is unlikely to achieve its major objective. The costs are of two kinds. First is the considerable time and money that is spent and continues to be spent in implementing and administering the amendment.

Administrators and faculty members in nine Harvard faculties have spent countless hours in seeking to understand a complex law and to apply it to the varying circumstances in each of the faculties. Were these hours well spent when no problem had been identified that needed correction? We think not.

Second, there has been a considerable intangible cost. A Federal law has supplanted self-governance at Harvard and other institutions. Policies and procedures that formerly were resolved collegially are now frequently resolved by reference to my office. Students and faculty must do things that seem foolish to them. For example, when a student applying to a graduate school asks a faculty member to write a letter of recommendation, the faculty member must then ask the student to sign a form giving his written consent to the faculty member to put information about him in the letter. The oppressive weight of bureaucracy is keenly felt.

In my experience from what I have seen at other institutions, I believe, because of the complexity of the law and other problems institutions of higher education have, there has been a fair amount of difficulty in understanding the law, and my sense is that compliance is not that high in the country. We, institutionally, therefore, oppose the legislative enactment of those recommendations of the Privacy Protection Study Commission that involve an extension of the reach of the Buckley amendment.

In my prepared statement I have listed ones that are of particular concern and I won't repeat them.

I would like to mention one that is not in my statement which I think is a graphic example of trying to apply a national rule and it just doesn't work, and of the kinds of time and effort that are required to comply with this law.

Recommendation 8 of the Commission states that,

> The Act should be amended to require that an institution establish, promulgate and enforce administrative sanctions for violation of its policy in implementing this Act. Such sanction should be levied on chief executive officers of educational agencies and components thereof who are negligent in pursuit of institutional compliance as well as upon employees who violate the provisions of the policy.

If you try to apply this to a major research institution, you are talking about promulgating sanctions for the President of the University of Kentucky, University of Alabama, promulgating sanctions for the Deans of Law Schools and Medical Schools. Major research institutions don't operate that way, with lists of sanctions for their officers, if they have violated some policy or not.

The question of what is an appropriate sanction for the President of Harvard, if he is "negligent," in pursuing our policies under this Act, I think, is basically a silly question. The President of Harvard stays or doesn't stay in office according to the views of the governing board as to whether he is doing an adequate job.

This position would apply to faculty. We are supposed to promulgate sanctions for employees, I guess, "faculty," who violate the policy. I know you are familiar, Mr. Chairman, with how universities operate. The administration can't promulgate sanctions for the faculty. The universities operate in a collegial fashion. It would require at Harvard, say, extensive discussions with nine different faculties to try to develop sanctions that are to apply to faculty. And you can imagine a discussion among 65 members of a law school faculty trying to determine what appropriate sanctions are for different violations of this Act.

I am not saying that such a provision as this recommendation indicates may not be needed in some parts of our education system, but I do believe it is a very good example of the difficulty, I think the impossibility, of legislating nationally for all kinds of institutions from kindergarten to major research institutions and the kind of time that is needlessly spent with complying with this Act when there has been no indication of a national problem in institutions of higher education.

Thank you, sir.

Chairman **Perkins**. The next witness is Mr. Salett.

Go ahead, Mr. Salett.

STATEMENT OF STANLEY J. SALETT

Mr. **Salett**. My name is Stan Salett. I would like to submit my written statement and try to summarize some of our major points.

[The prepared statement of Mr. Salett follows:]

STATEMENT OF STANLEY J. SALETT, SENIOR ASSOCIATE, THE NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION, BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR, SUBCOMMITTEE ON ELEMENTARY, SECONDARY AND VOCATIONAL EDUCATION

TUESDAY, AUGUST 2, 1977, IN WASHINGTON, D.C.

Good morning, Mr. Chairman and honorable members of the Committee. I am Stanley Salett, Senior Associate of the National Committee for Citizens in Education.

I am very pleased to have the opportunity to testify on an issue of continuing concern to our organization and the parents of public school children. A substantial portion of my testimony will report on our grassroots effort to monitor compliance with the Family Educational Rights and Privacy Act of 1974 during the last year.

Invited to participate in the study were the nearly 300 Parents' Network groups currently affiliating with NCCE and representing a combined membership of 150,000 parents in 40 states. Included in the Parents' Network are local chapters of PTA, the Association for Children with Learning Disabilities, Title I Parent Advisory Councils and many independent parent organizations. Groups join the Network to receive technical assistance and information from NCCE. In turn they provide a sounding board for public opinion on school related issues.

As some of the members of this Committee are aware, the confidentiality of school records is more than a passing interest to NCCE. In 1973, when the National Committee for the Support of the Public Schools was reorganized into the present National Committee for Citizens in Education, we gave school records a high priority. In October of that year, we began a state-by-state study of record keeping practices and ultimately published a volume entitled Children, Parents and School Records in which we reported our findings. At that time, only 12 states had statutes allowing parents any access to their children's files. What was even more alarming was the carte blanche many schools gave outside sources for the use of children's records. Without any degree of family control over what went into and stayed in school records, many children's files had become dossiers of misinformation that followed them through school and into adult life.

The office of former Senator James L. Buckley became aware of the state of school records through a feature in Parade magazine, "How Secret School Records Can Hurt Your Child" (March 31, 1974). The article documented our interest and the Senator called our staff immediately.

From this point on, the history of the Buckley Amendment is well known to you. But the passage of FERPA before the year was out did not end NCCE's concern about the protection of school records. As a citizens' advocacy group, we felt a continuing responsibility to monitor the law, its promised regulations and its administration within DHEW on behalf of parents.

As I am sure you are aware, we have been vocal in our praise and criticism of the uneven progress of the implementation of this law. We have had many occasions to refer parents to the office of Thomas S. McFee, Deputy Assistant Secretary for Management Planning and Technology of DHEW (under whose responsibility the Fair Information and Practices Division falls), to report noncompliance. In every case we have been impressed with the prompt and professional response of his staff. It is greatly to their credit that more than half of the complaints registered have been resolved without resorting to the threat of cutting off funds.

While we have been pleased with the speedy passage of the law and the competence of its administration, we also have expressed displeasure over the unconscionable delay in issuing procedural guidelines for FERPA. In the 1½ years it took to deliver the first regulations, our network of parents' groups and an informal survey of public school systems told us that many districts were delaying implementation of the law on the grounds that no regulations existed. When those regulations finally were issued, we found them sound and used every resource available to us as a nonprofit organization to inform parents of their rights under the law.

We now have had one year's experience with the full force of the Buckley Amendment and its regulations. I am here today to tell you about the early results of our efforts to find out how well the law is working at the local level. It is our hope that the data will guide you to areas where the law can be improved and clarified. Our early reading of the recommendations of the Privacy Protection Study Commission report tells us that you have in it a second valuable resource for consideration. I would just like to say that wherein these recommendations strengthen the rights of parents and school children in protecting school records we applaud them. Specifically, injunctive relief for citizens in school records cases strikes us as a suitable remedy for parents and a deterrent to abuses by school systems. We agree educational agencies should establish affirmative standards for entries in school records and extend rights of challenge by parents to prior decisions based on faulty records. Such provisions would reach other sources of harm that can be done to children by their records. We urge your serious consideration of these recommendations.

But we respectfully disagree with those of the Commission's recommendations which would increase access to records by third parties without parental consent. To allow release to researchers and social service agencies is a reversal of parents' new-won rights and not one they will (or should) give up gracefully.

I now come to the primary reason for testifying here today. I want to share with members of this Committee some of the data now being gathered by parents in local public school districts around the country. NCCE initiated this citizen oversight of the law during the spring of this year in cooperation with the National Urban League and the National Council of Jewish Women. This monitoring effort has employed parent interviewers in an attempt to gauge school administrators' awareness of the law and their willingness to comply with its provisions. To date, we have tabulated information from 170 sources, representing 124 school districts plus 46 separate school buildings in 25 states.

Before characterizing responses to our 20 point questionnaire, I would caution Members that our task is not yet complete. We expect at least 50 - 75 more replies from local chapters of the National Urban League as well as a few surveys outstanding from members of NCCE's Parents' Network. Until we have completed our poll and discussed the figures with our collaborators, we will not be ready to draw a final set of conclusions; however, we at NCCE felt the release of data at this time to be of greatest usefulness to this Committee; therefore, we have made special arrangements to present some early findings to you today.

Foremost in our minds as we undertook this study was the question, "How well is the law working at the local level?" "Is there real and ready access to personal school records by parents and eligible students and is there substantial protection of those records from third party disclosure?" It is all very well to prescribe a set of federal remedies for maintaining confidentiality of school records, but if school officials and parents are not aware of the law or do not understand its provisions, it is futile to expect compliance.

We were eager to know if all appropriate school personnel now understand the law and if they are advising parents of their rights. Certainly we were interested in the level of compliance. (Early returns show that compliance is not uniform within a district. As one would expect with so new a law, some provisions are better understood and easier to implement than others.) But we were also curious about the method of compliance. The Buckley Amendment is a law which allows for a degree of local discretion in such matters as formulating policy and disseminating information. We wanted to gather examples to show just how school districts are fulfilling their responsibilities.

Many of our questions tested adherence to the letter of the law but some go beyond that. We were searching for exemplary practices by local school districts which exceed the minimum requirements. We did find some. Schools which provide parents with a personal copy of their policy regarding school records or waive a waiting period for parents to review records are acting in the real spirit of the law's intent. In addition to hard data, we were interested in anecdotal comments from school personnel on their perceptions of how well the law works where they live.

As I have said, our primary mission was to monitor a widely publicized law. We have used other means, principally training sessions and our monthly publication NETWORK for parents, to inform parents about the law. We are finding, however, that for the nearly 200 parents participating in the survey, their level of awareness of the law has been greatly heightened. A further benefit to parents in districts surveyed has been the personal dialogue between citizen and school administrator centering around carefully structured questions about the law and not on the occasion of a personal request to review or amend a child's record. We draw this preliminary conclusion on the basis of the interviewers' success rate in seeing key school personnel and the remarkably low level of resistance from personnel encountered by parents. In a number of instances, an administrator asked for copies of the questionnaire for district-wide use.

Here is how the survey was conducted: participating parent organisations asked for member volunteers to interview school personnel about the district's experience with FERPA. If they could not get an appointment to interview district level personnel, they were told to go over the questionnaire with a local school principal asking about about building level practices.

Interviewers carried identical questionnaires (see attachment I). Listed were 20 questions about the law which could be answered by "Yes" or "No." Several also asked for additional comment. Questions addressed these specific provisions of the law: Institutional Policy and Procedures; the Right to Inspect and Review Education Records; Prior Consent for Disclosure; Record of Disclosures; Annual Notification of Rights; Amendment of Education Records: Right to and Conduct of Hearing; Definitions: "education records" and "eligible student"; and Complaint Procedures. In addition several judgmental questions were included asking how well parents are informed and whether the law is a good one.

In no instance was compliance or knowledge of the law 100% but on most provisions, 90% or better compliance was indicated. There are still a few administrators who after 2½ years claim they do not know of the law's existence. In spite of the fact that HEW has conscientiously distributed literally thousands of copies of the law and its regulations to school districts, there is not yet a federal law requiring school administrators to open and read their mail. Again, with the caveat that the data is incomplete and has not yet been fully interpreted, this is what parents found out about the law in practice: About 10% of schools and school systems polled admitted they have not yet advised parents of their rights as required. Over 98% said that they are obtaining parental consent prior to the release of material to third parties and over 70% said they are prepared to provide copies of material in school records upon parental request. The provision found to be the most neglected by local school districts, according to the survey, is in advising parents of their right to file a complaint with HEW if they feel their rights under the law have been violated. Over 50% of schools and districts said they have not done so. (One cannot help but wonder how this affects the number of complaints reaching HEW.) Contrary to early complaints and dire predictions of the impact of the law, over 90% indicated they have enough personnel to deal with requests from parents to see records.

Other Highlights of the survey are summarized as follows:

Institutional Policy and Procedures:

> 90% have advised parents of their rights in accordance with the law. Half of these have sent individual notices, 1/3 have used newspaper publicity, another 1/3 handbooks, newsletters and parent organizations.
>
> 85% have developed a new written policy on school records since 1974, however, a much smaller number actually have sent a copy of that policy to parents. One half of those remaining said the policy was available to parents upon request. Some administrators cited the cost of sending out copies to individuals as a reason for providing them on a request basis.

Right to Inspect and Review Education Records

> Roughly 2/3 of districts have developed a form for parents to request their child's record. While few officially have shortened the maximum waiting period allowed by law (45 days), the average actual waiting period was found to be no more than 2 days.

Disclosure of Personally Identifiable information from Education Records:

Prior Consent for Disclosure

> Over 98% indicated they are obtaining parental consent. A few still release records without consent to employers and athletic scouts.
>
> 92% are notifying parents of the release of information required by subpoena.

Record of Disclosures

93% are keeping a log of persons requesting a record or at least a record of the transaction on the student's file.

Annual Notification of Rights

Nearly half the district are choosing to notify parents of their rights at the beginning of the school year. Individual notices are the most frequently used method. Handbooks are second in popularity, although local newspapers are also used.

Right to Inspect and Review

Better than 97% of school systems assign someone to stay with parents while they are examining records. Comments made it clear that this is sometimes a "watchdog" function and sometimes to offer interpretation and guidance. Many commented that changes and removals are made at this time at the parents' request.

97% honor parents requests for copies. Sometimes they are free, but charges run as high as $1 per page.

Amendment of Education Records: Right to, and conduct of, hearings

Nearly 91% say they spell out an appeal and hearing procedure for parents.

Definitions: Education records

1/3 of administrators knew that records can include more than written material; 1/3 did not know this and 1/3 said it makes no difference in their district since all records there are in written form.

There were almost no admissions of having denied parents student records, although many commented that psychological reports, teachers' and guidance counselors' personal notes and other "confidential" materials are usually not part of the student records and therefore not available to parents. A few stated that personal information of a detrimental nature (i.g. child abuse, drug use or other potentially damaging material) could not be included in the records shown to parents. One remarked that a child's IQ is never given to a parent, and in spite of clarifying regulations, there still remains a great deal of confusion over the rights of noncustodial parents to see records.

Definitions: "eligible student"

Most public schools feel their 18 year olds understand that they have access to their own records. About half understand that parents no longer have access when a student reaches majority, but several cited local rulings which give parents rights as long as a child remains a dependent.

Complaint procedure:

Fewer than half the districts polled, notify parents that they have the right to file a complaint with a review board within HEW. One frustrated comment: "What good does that do? The school will only deny everything."

Judgmental questions

Are parents well informed of their rights under the law?

Opinion was evenly divided. Some commented that even extraordinary outreach to parents could not reach the 2% who most need to know and apply the law.

Interviewers' comments on how FERPA is working locally

(see attachment II)

Overall, we feel the experience was an edfying one for both parents and school personnel involved - It certainly has proved so for us. Over and above the data gathered, it has provided an opportunity for citizens to check school practices in a non-threatening way for officials. Certainly there are things that we might do differently if and when we undertake another such citizen monitoring effort. But even with the results still coming in, I think the exercise has shown that citizens, once organized and given guidelines, prove creditable watchdogs for existing legislation. Lay citizens can conduct their business in the public interest without arrousing the ire of public officials. In the process, both parties gain in understanding.

Mr. Chairman, I hope that this material has been helpful to you. I will be happy to answer any questions you or other members may have.

Attachment I

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

Questions To Be Asked At The Local School System Level
Elementary and Secondary Schools

__INTRODUCTION__

The Family Educational Rights and Privacy Act became a national law in November, 1974. The law, among other things, gave parents the right to examine the records of their children and some control over third parties (people besides school personnel) who wanted to have information from school records. In June, 1976 the federal government published "regulations" to be used in implementing the law - definitions and procedures which help people in schools implement the law in the most complete way. Some school officials moved ahead to put the law into effect soon after the law passed in late 1974. Other school officials said they could not do a good job of putting the law into full effect until they had the help which the regulations would give. But local school systems have now had the regulations available since September 1976.

It is one thing to recognize a problem and another to have a law to try to deal with the problem, but nothing matters if changes are not taking place as a result of the law. That is why we are asking you to take time to find out how the law is working in your school system. If you get answers to these 20 questions you will have a first hand understanding of how your school system has acted to improve the way it keeps your child's records. In sharing the results with us you will be helping to find out how the law is being honored nationally. That is important because it gives us (and you) a way to let the Congress know if its purposes and intentions in passing the law are working out. It's one way of letting the Congress know that it did something that helped you, or that maybe that the law needs to be improved, or violations prosecuted more forcefully.

We thank you for what you are about to do for yourself - and for helping to do a national survey about an important effort to improve the quality of public education.

Name of School District ______________________ *Town* ___________ *State* ________

If this is school building rather than school system information check here ____.

	Yes	*No*
1. Has the school system advised parents of their rights under the Family Educational Rights and Privacy Act? How? Newspaper _______, *Individual Notice* _______? *Other* _______?	____	____
2. Has the school system developed a new written policy (since November, 1974) for keeping school records?	____	____
3. Does the school system plan to provide parents with a copy of these new school record-keeping policies?	____	____
4. Has the school system developed forms on which a parent may request to see his/her child's record?	____	____

	Yes	*No*
5. *Has the school system established a waiting period different from the federal legislation (maximum 45 days) between the time of parents' request to see his/her child's record and the honoring of that request?*	____	____
6. *Is the school system obtaining dated, written consent of parents before releasing material from a record to employers, juvenile courts, social agencies?*	____	____
7. *Is a log or listing kept of persons outside the school system who have been provided information from a record?*	____	____
8. *The law requires that parents be advised at least once a year of the types of records maintained by the school system and the location, and the job titles of the school officials responsible for each type of record. At what point in the school year have they decided to do that? Beginning of the year _______? Sometime during first semester _______? Sometime during the second semester _______?*		
9. *Does the school system assign some school employee to stay with parents when the record is turned over to parents for examination in order to be sure nothing is removed or changed?*	____	____
10. *Will the school system honor parent requests to have material copied from his/her child's record?*	____	____
11. *Do school officials feel they have enough people to respond to the general requirements of FERPA and to parental requests for interpretation of material in student records?*	____	____
12. *Do school record-keeping policies spell out a hearing procedure if parents decide there is inaccurate or misleading information in the record?*	____	____
13. *Do school record-keeping policies spell out an appeal and hearing procedure for parents who feel their rights under the law have not been honored?*	____	____
14. *Can you make a judgment about how well informed the parents in your school district appear to be about their new rights under this law?*	____	____
If yes, most appear to be informed _______? Some _______? Most are not aware of their rights under this legislation _______?		
15. *Are any student records denied to parents?*	____	____
If yes, which ones?		

____

____

____

	Yes	No
16. Do school notices to parents make it clear that school records include more than written material - such as, material about children on a tape, file or computer?	____	____
17. Do parents understand that FERPA also allows them to examine their own school records for the period they were in school?	____	____
18. Each school system has students who are 18 years of age or older. Do those students understand that this law allows them to request access to their own records?	____	____
19. Does notification to parents of their rights under FERPA include the fact that they may file a complaint with a review board in the Department of H.E.W. in Washington, D.C. if they feel their rights under this act have been violated?	____	____
20. Do school personnel seem to feel the law is a good one?	____	____

PLEASE SEND US A COPY OF THE POLICIES WHICH YOUR SCHOOL SYSTEM HAS DEVELOPED FOR SCHOOL RECORDS.

Send completed form to:

Suite 410
Wilde Lake Village Green
Columbia, MD 21044

Interviewer's Name ______________________________ Date ________________

Attachment II

Interviewers Comments

"They have had few requests for records, even though they sent out a 'notice to patrons' they tell me they have always had a strict policy against outsiders seeing records."

"There has been a tremendous improvement in the law's administration since the visit by a member of the National Council of Jewish Women about one year ago to check on this same subject."

"If there is a problem, it is that parents do not regularly, say once a year, inspect their child's cumulative file."

"It costs a great deal of money to initially clean-up the files and establish a set of regulations. In the long run it is worth it."

"We found the information readily available upon request."

"The principal would not allow the teachers to show the records and if any of the records showed referrals to the Learning Disabilities Clinician or the school psychologists, the principal insisted they be present, too, which meant a wait of several days."

"Several mistakes in the records were found but they were immediately rectified."

So far, "I've heard of no challenges," and the hearing officer, has said there have been none.

He did mention one area where the act seems to be working well. This is incidental to its intention. In several cases handled by his department, "parents brought suit against local districts, asking that the districts pay for special educational needs as supported by the records and the special evaluations contained therein." This indicates that parents are investigating how their children are "labelled." In some cases the label was challenged in court.

"Parental and student rights under the law are not well publicized nor strictly adhered to. Salaried school personnel jealously guard their domain and inquiries and suggestions are totally unwelcome."

"Very little has been done to inform parents of their rights under this law. If a parent knows exactly what records and reports she wants to see, they will be made available to her. No records, test scores are volunteered."

"A new policy manual is in the process of being rewritten, although it is about 1 year behind schedule."

The Assistant Superintendent for Pupil Personnel Services was most cooperative and said, "he would be very much interested in the results of the survey."

"There is no public agency monitoring compliance, so the Board of Education has been lax in seeing to it that its personnel are complying. Although the Board has issued the new regulations to school personnel, it has not told them exactly what they should be doing, for instance, cleansing the records once a year or making available free photocopies of records."

Mr. **Salett**. My reason for coming here this morning is to share with some of the members of the committee some of the information we are getting as to the Family Educational Rights and Privacy Act.

We initiated this program last spring. This monitoring effort is employing parent interviewers in a unique attempt to gauge the effectiveness of the law.

To indicate, we have tabulated information from 170 sources representing 124 school districts and 46 separate school buildings in a total of 25 States. Before summarizing the responses to our 20-point questionnaire, I would like to caution the members, our information is not complete. We still expect questionnaires from 50 to 75 school districts. When we have completed the final questionnaire we will share it with the committee. We must consider our findings preliminary; however, we did feel the importance of this hearing here today was so great, we would try to share our findings with you today.

Mr. **Blouin**. You are not going to propose the statistics you have as an accurate sample of your actual survey with only partial data available?

Mr. **Salett**. That is correct.

Mr. **Blouin**. So the committee can expect this to be fairly accurate information?

Mr. **Salett**. That is correct; but when you take into consideration the number of school districts responding, it will give you some very preliminary sense as to how well the law seems to be working. These findings are not, as I say, in any way conclusive.

Chairman **Perkins**. Is that all your statement?

Mr. **Salett**. No; I have the particular questions and the answers we have derived therefrom.

Perhaps it might be speedy to turn to the questionnaire itself. It is attached to the end of the testimony. I will pose the questions and just say very simply what we have found to date. Our first question was: "Has the school system advised parents of their rights under the Family Educational Rights and Privacy Act?"

Ninety percent have informed parents of their rights.

No. 2. "Has the school system developed a new written policy (since November, 1974) for keeping school records?"

Eighty-five percent of the school districts have developed a new written policy.

No. 3. "Does the school system plan to provide parents with a copy of these new school record-keeping policies?"

Here we found only 40 percent actually provided parents with the actual policy, itself; fifty-three percent didn't.

No. 4. "Has the school system developed forms on which a parent may request to see his/her child's record?"

Fifty-nine percent had, thirty-six hadn't.

No. 5. "Has the school system established a waiting period different from the Federal legislation (maximum 45 days) between the time of parents' request to see his/her child's record and the honoring of that request?"

We found 36 percent of the school districts had provided a different waiting period but the overall average was two to three days.

In other words, it was a very fast response.

No. 6. "Is the school system obtaining dated, written consent of parents before releasing material from a record to employers, juvenile courts, social agencies?"

Here we found 96 percent of the school districts are obtaining written permission before releasing information to third parties.

Chairman **PERKINS**. You mean obtaining written permission from the parents and the students?

Mr. **SALETT**. Yes; from the students if they are 18 or over.

Eighty percent replied they were notified of release of information by subpoena.

No. 7. "Is a log or listing kept of persons outside the school system who have been provided information from a record?"

Eighty-six percent of the school districts said yes, they do keep such a log.

No. 8. "The law requires that parents be advised at least once a year of the types of records maintained by the school system and the location, and the job titles of the school officials responsible for each type of record. At what point in the school year have they decided to do that?"

Most are provided such information and at the beginning of the school year, over 90 percent compliance with that.

No. 9. "Does the school system assign some school employee to stay with parents when the record is turned over to parents for examination in order to be sure nothing is removed or changed?"

Ninety-four percent of the school districts do provide somebody to sit down and explain this.

No. 10. "Will the school system honor parent requests to have material copied from his/her child's record?"

Ninety-three percent will provide that service.

No. 11. "Do school officials feel they have enough people to respond to the general requirements of FERPA and to parental requests for interpretation of material in student records?"

Eighty-eight percent said they did have enough people to respond. That is very interesting because some of the 58 organizations, at the outset of the legislation, indicated that school officials would be overburdened with these requests and we would have to hire additional staff to meet demands.

No. 12. "Do school record-keeping policies spell out a hearing procedure if parents decide there is inaccurate or misleading information in the record?"

Eighty-six percent of the school districts do spell out a hearing procedure.

No. 13. "Do school record-keeping policies spell out an appeal and hearing procedure for parents who feel their rights under the law have not been honored?"

Eighty-one percent do.

No. 14. "Can you make a judgment about how well informed the parents in your school district appear to be about their new rights under this law?"

That was very difficult for our parents to do; there was a spread of information.

No. 15. "Are any student records denied to parents? If yes, which ones?"

As to one of the areas Mr. McFee was alluding to, IQ records or psychological records don't apply under the law.

Chairman PERKINS. Are the parents still denied those records?

Mr. SALETT. In some cases, when school administrators do not fully understand the law.

Chairman PERKINS. Even before we enacted the amendment, we had very few complaints in my area. The situation could have been different in New York and California, some other States. There were some complaints in this area where the parents didn't have access to the records of the child and the parent wanted to ask the school superintendent how the child was proceeding in school, getting along. It has always been the general practice throughout the country, that the school superintendents would cooperate with the parents, notwithstanding the Buckley amendment. That has been the real purpose of the Parent-Teacher Association throughout the history of our educational system at the elementary/ secondary level.

I am more interested in knowing to what extent we have obtained greater results since the Buckley amendment was passed at the elementary/ secondary level.

Would you kindly comment on that?

Mr. SALETT. Our original research on the state of record-keeping practices was in a book called "Children, Parents and School Records." We looked at all the State statutes and found only 12 States prescribed specific record-keeping methods. It was pretty much up to the local superintendent and school principals as to whether or not a parent had access to school records. We felt it was practical if a parent asked the question and asked to see the record. You take that in good faith and use that setting to really discuss a child's future and past with a parent and the teacher and that becomes a very useful, positive experience and very useful to the children.

Chairman PERKINS. That was the real reason we put guidance and counseling in the elementary and secondary schools in the country.

Mr. SALETT. However, we did find instances where parents were denied sight of their children's school records.

When an article was published in Parade Magazine entitled, "How Secret School Records Can Hurt Your Child," based on our findings, the work of the Russell Sage Foundation and many other organizations. As a result of that article, we got seven thousand letters from parents all over the country telling us of school record abuses. It shocked us. There was a lot we did not know was going on. I think as a result of that study and that article, we felt there were large-spread abuses and Federal legislation was required.

Supporting Mr. McFee's finding, at the Federal level, the law is working quite well. Administrators are complying with it; parents are taking advantage of it; and third parties are prevented from seeing those same records.

No. 20. "Do school personnel seem to feel the law is a good one?"

This is the response of 170 school administrations: Thirteen had mixed feelings; many said it was too costly and took personnel away from other duties; the great majority had no specific reply. In other words, there was less subjective information and more access to parents as well as more of a screening process.

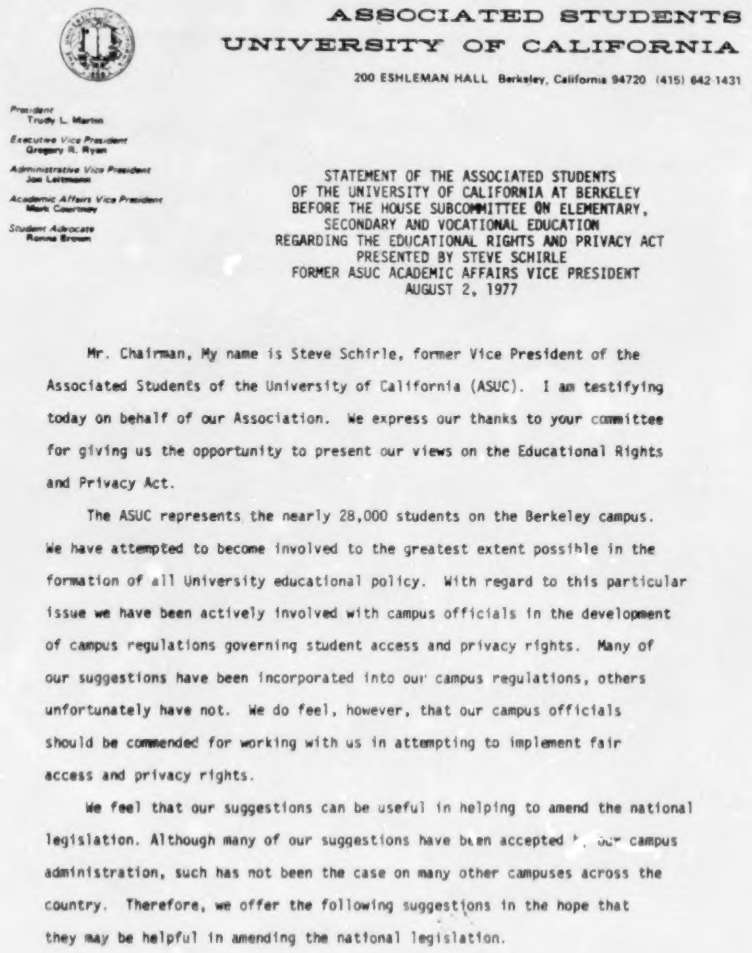
I think in summary, that the law is working quite well and while there are some areas which need improving, we are quite pleased with the progress.

Chairman **Perkins**. We will hear from the student, Mr. Steve Schirle, representing Associated Students of the University of California.

STATEMENT OF STEVE SCHIRLE

Mr. **Schirle**. I would like to submit my written testimony for the record.

[The prepared statement of Mr. Schirle follows:]



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Student Advocate
Ronna Brown

STATEMENT OF THE ASSOCIATED STUDENTS
OF THE UNIVERSITY OF CALIFORNIA AT BERKELEY
BEFORE THE HOUSE SUBCOMMITTEE ON ELEMENTARY,
SECONDARY AND VOCATIONAL EDUCATION
REGARDING THE EDUCATIONAL RIGHTS AND PRIVACY ACT
PRESENTED BY STEVE SCHIRLE
FORMER ASUC ACADEMIC AFFAIRS VICE PRESIDENT
AUGUST 2, 1977

Mr. Chairman, My name is Steve Schirle, former Vice President of the Associated Students of the University of California (ASUC). I am testifying today on behalf of our Association. We express our thanks to your committee for giving us the opportunity to present our views on the Educational Rights and Privacy Act.

The ASUC represents the nearly 28,000 students on the Berkeley campus. We have attempted to become involved to the greatest extent possible in the formation of all University educational policy. With regard to this particular issue we have been actively involved with campus officials in the development of campus regulations governing student access and privacy rights. Many of our suggestions have been incorporated into our campus regulations, others unfortunately have not. We do feel, however, that our campus officials should be commended for working with us in attempting to implement fair access and privacy rights.

We feel that our suggestions can be useful in helping to amend the national legislation. Although many of our suggestions have been accepted by our campus administration, such has not been the case on many other campuses across the country. Therefore, we offer the following suggestions in the hope that they may be helpful in amending the national legislation.

Recommendations

1) The definition of a student should be expanded to encompass both persons seeking admission as well as those who are currently enrolled.

2) Individuals other than the student, letter writer and the campus record keeper should not know whether the student waived his/her right of access.

3) Notification of rights should be published each school term and should utilize multiple media sources.

4) Disclosure of educational records to school officials and research organizations should be more restrictive. The names of school officials that have had access to a student's record should be registered and included in the record.

Defining A Student

The ASUC believes that the definition of a student should be expanded to include persons who are applying for admission. Clearly the records kept by institutions on candidiates for admission are educational records. It is also clear that misleading, inaccurate or inappropriate material can be contained in these records. Hence the very same arguments which supported access for currently enrolled students can be used to support access for candidates seeking admission.

Admissions information is perhaps the most critical information held by an institution in the view of many individuals. It is in these files that the greatest errors are likely to be found and where they have the most impact. With today's keen competition for graduate and professional schools even the slightest piece of inaccurate information can be the difference between rejection and acceptance.

There are many possibilities for error with regard to the file of an admissions candidate. Test scores or grades could be incorrectly reported, the wrong letters of recommendation could be sent or material may be inadvertently missing from the candidate's file. These errors can easily lead to the rejection of a candidate and will ge unnoticed unless an admissions candidate is given access to his/her education records.

Of course an applicant would still not have access to any confidential letters of recommendation which were placed in the students' records prior to January 1, 1975 or to which access has been voluntarily waived. Nor should applicants have any access to records of an admissions committee's deliberation.

Waiver Of Rights

Students have literally been forced to waive their constitutional rights to privacy and information regarding latters of recommendation. Counselors tell students that schools place more weight on confidential letters and might even ignore non-confidential letters. The colleges themselves have driven this message home to the students. Application packets to many professional and graduate schools state that the schools prefer confidential letters of recommendation and encourage applicants to waive their access rights.

Graduate schools often print the waivers on the top of the recommendation forms rather than have a separate waiver form that would be attached to the letter if a student should choose to waive his/her rights. The first thing that the reader will notice is whether or not the student had access to the letter. Hence, these forms are set up like positive and negative ballots - the admissions committee giving careful consideration to those marked confidential and almost ignoring those marked non-confidential. An example of this type of form from the Georgetown University Law School is attached to this testimony.

The incredibly tight competition for professional and graduate schools forces students to comply with schools' "requests" for confidentiality. These "requests" leave the student questioning whether a non-confidential letter will even be read by the admissions committee when a waiver form is accompanied by such statements as those given below.

> From UCLA:
> "...in order to obtain candid evaluations of a student, it is *deemed desirable* that letters of recommendation be written and *maintained in* confidence. While non-confidential letters will be received and carefully considered, the School of Architecture and Urban Planning believes that confidential letters may have *more utility* in the assessment of the student's qualifications *and abilities*." (emphasis added)
>
> From Georgetown Law School:
> "The *importance* of candor in the college admissions process was *recognized in* the formulation of this law. It is possible, therefore, to execute a waiver of access to certain documents which contain subjective evaluations *important* in a *competitive* admissions process. Since it has been our experience that confidential recommendations are *frequently* more *candid* than non-confidential letters, we have placed waiver statements on several documents contained in this brochure for your use." (emphasis added)

The lack of choice available to students is evident in the large number of waivers that have taken place at the University of California.

We believe that universities should encourage students and faculty alike to initiate and learn from frank, critical communication. The Buckley waiver policy in the format that has surfaced at most universities assumes that open, yet frank communication is not possible.

We also believe strongly that letters of recommendation speak for themselves. An enthusiastic, candid assessment of one's capabilities does not have to be labelled "confidential." Any counselor, administrator or employer will admit that strong recommendations stand out because they indicate extensive knowledge of the student's work and personal contact. The critical variable in a meaningful recommendation is not confidentiality but the effort of the writer.

At a minimum we feel that law should be amended so that only the student, the letter writer and the campus record keeper know whether letters of recommendation are confidential or not. The waiver should reflect an agreement between the letter writer and the student and should not be made available to graduate school admissions committees. Only if this step is taken will students be given a choice as to whether or not they should waive their rights.

Notice

Since students are a transient population there is a great need to periodically inform them of their rights under the Educational Rights and Privacy Act. Mere publication of campus regulations in some official campus newspaper or publication will not serve to adequately inform students of their privacy and access rights.

We recommend that the law mandate notification by multiple mechanisms. In a university setting we believe that notification can be rendered in the following manner. All academic and administrative units maintaining student records should prominently display at their main offices and in all major publications Buckley rights and procedures. Certain central campus information centers should display and provide as handouts descriptions of these rights. A description of rights should also be included in all major campus catalogues and publications of a wide circulation. Finally, one central campus office should be identified to entertain all questions regarding Buckley and campus regulations.

Also, we recommend that students be notified each school term rather than on an annual basis. This is necessary because many students will take a term off for work, travel, unaccreditted study or some other reason.

Disclosure

The ASUC finds the regulations on disclosure without student consent needing change in two areas. The access privileges must be tightened for both school officials and for organizations conducting educational research.

Current legislation allows all school officials who have a "legitimate educational interest" access to student records. We feel that this disclosure rule is much too broad particularly since neither the federal regulations nor our campus regulations define "legitimate educational interest." We feel that such vague language is inappropriate in legislation designed to protect the privacy rights of students.

In many instances we see no reason why prior student approval should not be given before a school official has access to a student's record. A common example of a school official desiring access to a student's record is a counselor who might want to view the record so s/he can provide appropriate advice that corresponds to the academic progress of the student. However, at most universities advising is done at the request of the student. Hence, if the student feels it will be helpful for the advisor to have access to his/her records then the student can give this permission. We see no reason why school officials should have almost indiscriminant access to student records.

We also find it important that the names of all school officials who have had access to a student's educational record be included as part of the student's record. This is the only safequard a student has to protect his/her privacy rights from abuse by school officials. First, despite the vagueness of the term "legitimate educational interest" we recognize the difficulty in finding an appropriate definition. Second, the record keeper is a colleague of the school official making the request for access and will have little to gain from turning down a colleague's request. For these reasons a log should be kept in the student's record of all school officials who have had access to the record.

We find the regulations governing the access of organizations conducting educational research also too broad. It is unnecessary that personally identifiable information be available to researchers in all instances. Often a much broader classification (i.e. school year, field of study, ethnicity) is all that is necessary to conduct useful research. The burden should be on the organization conducting the research to show that personal identification of students is necessary. Access to personally identifiable information should not be allowed except in those cases where an organization can show a compelling need to identify individuals.

We hope our testimony has been useful to this committee and we will be happy to answer any questions you may have regarding our positions. Once again the ASUC would like to thank you for giving us this opportunity to present our views on the Educational Rights and Privacy Act.

GEORGETOWN UNIVERSITY LAW CENTER

APPRAISAL OF APPLICANT

______________________________ Undergraduate College ______________________
Last Name First Middle

WAIVER OF ACCESS

I have requested that this appraisal form be filed by (Name) ______________________ for use in the admissions process and in counseling by officials of Georgetown University Law Center. In accordance with the FERPA 1974 (check one)

☐ I waive access to this report which shall be considered confidential

☐ I do not waive access to this report (non-confidential)

Date ________________ Student Signature ______________________________

Note - If the student has agreed to the waiver printed above, we will preserve the strict confidentiality of this document and it will be made available only to University officials. If the student has not agreed, this report will be made available to the student on request, if he or she enrolls as a student of Georgetown University Law Center.

How long, in what connection, and how well have you known the applicant?

Please rate the applicant on the following scales and indicate the group with which the applicant is being compared for the purpose of these ratings.

	No Basis for Judgment	Below Average	Average	Good	Very Good	Outstanding	Truly Exceptional
		Lowest 40%	Middle 20%	Next 15%	Next Highest 15%	Highest 10%	
Native Intelligence Analytical Powers Rigor of Thought Critical Facility Reasoning Ability							
Independence of Thought Originality Imagination Creative Intelligence							
Effectiveness of Communication Oral							
Effectiveness of Communication Written							
Industry and Motivation Persistence Self Discipline Study Techniques							
Judgment and Maturity Conscientiousness Common Sense							
Leadership Ability							
Personality Attributes Ability to Relate							

- OVER -

Chairman **Perkins**. Tell us whether there is any necessity to give you the right to sue.

Mr. **Schirle**. I think it is a very important issue and our student association has asked for a definitive answer to this. It is something I think students feel very strongly about, something they should have, access to records.

First of all, as to the definition of a student, our association would support, namely, that we expand the definition to include people seeking admission to an institution. There could be mistakes in grade, mistakes in grade scores and missing information which could lead to rejection of a candidate and this candidate will never know whether or not he is rejected due to incorrect information.

Second, students, if you were to query a student as to whether he was more concerned as to the admission information or the records held on him, the vast majority of the students would say they were more concerned as to the asmissions information rather than information at the school where they attend.

The second point has to do with waivers. This is a supplement to the prepared testimony. Waivers should not be mandated by the Buckley law. Our rationale is three-fold: First of all, we don't have mandated waivers to other important rights such as freedom of speech or freedom of religion. They are simply voluntary. If a student felt it was important to have a confidential letter, he could make an individual agreement with the professor and submit that to the record keeper. Our present policy has led to coercion. In admission packets—I have just finished applying to law school, as thousands and thousands of other students have finished applying, and in many of these admission packets you receive the same instruction. Here it is: "The importance of candor in the college admissions process was recognized in the formulation of this law. It is possible, therefore, to execute a waiver of access to certain documents which contain subjective evaluations important in a competitive admissions process. Since it has been our experience that confidential recommendations are frequently more candid than non-confidential letters, we have placed waiver statements on several documents contained in this brochure for your use."

On the first level, schools are suggesting that you waive your rights of access. If you are in a very competitive process, which application to law school is, the odds are only 1 to 20 that you will be accepted. Here schools are telling you it would be to your benefit to waive your rights. Most of the students I know have waived their rights.

On the other level, counselors and advisors are telling students it will be to their own benefit to waive their rights. In essence, students have no rights under the present law. If there was any hard data, we would find the vast majority of students applying today are waiving their rights.

On the issue of waivers, we don't feel there is any reason why a professor couldn't write a letter of recommendation. A professor must evaluate a candidate through a grade; these are open for, and subject to, dispute and conflict between the student and professor. If professors must candidly evaluate through grades, there should be a procedure through recommendation. They don't give out all "A" grades, then certainly they won't give all a top recommendation in a letter.

Disclosure should be tightened as to school officials. There are no safeguards for abuses from school officials. First, the language today suggests legitimate educational interests. But in a major university, the only way a professor would know about a student or want to see his records would be if he had him in his class, or if he was an administrator and the student needed a grade percentage. By the very nature of his role a teacher, advisor, administrator, that would provide him with legitimate interest to have access to a student's records. On the second level, there is no external enforcement of the disclosure rule by a college. The record-keeper would decide with his colleague, rather than the professor.

We feel the only way, minimally, we can provide a safeguard is to record all the names of all school officials who have had access to school records so a student will have some right.

Many times an ombudsperson, maybe representing a student in a grade appeals case, might review the student's record to see how he did in other classes. We feel that would be an abuse of the student's rights and might prejudice the case in this individual grievance procedure. That is one type of procedure we think the students should know about.

Those are the three areas I wanted to testify on today.

Chairman Perkins. Let me thank all of you for some outstanding testimony. I have a few questions here.

I will start with the first witness, Mr. Thomas McFee.

As the person responsible for administering the Buckley amendment at HEW, could you tell us whether more of the complaints filed with you were in the area of higher education or in the area of elementary and secondary education?

Likewise, can you tell us whether in your opinion there has been more compliance with the law at either level of education?

Mr. McFee. I can provide you some accurate statistics for the record and I will. My off-the-cuff guess would be the complaints are divided about equal. Compliance in the post-secondary has been better than it has been in the elementary.

Chairman Perkins. If you will find us some data along this line, we will appreciate it.

[The information requested follows:]

Thus far we have processed a total of 97 complaints. Of these, 44 have been directed toward the elementary or secondary level. The remaining 53 were directed toward the postsecondary level. These figures break down to 45% for elementary or secondary and 55% for postsecondary institutions.

Chairman Perkins. Mr. Higgs, your group recommends expanding the Buckley amendments to guarantee rejected applicants the right to look at their records and expanding the coverage of the Act to information kept by the Educational Testing Service and other organizations.

Does the Commission have any evidence that there have been abuses in these areas to justify such action?

Mr. Higgs. We have quite a bit of testimony as to the application process and the need for applying the rights available under Buckley to that process. In regard to ETS, ETS is a very systematic organization and has very good rules. They deal with the individual and give tests to the individual, however, they do it under contracts with organizations of the universities. Therefore, when they get caught in the middle between student rights and university needs they will side with their clients and will go along with the law school boards and entrance examination boards.

The application of FERPA to ETS wouldn't put on them procedures they are not now following except in one area. Let me give you an example of a problem area with ETS which didn't occur very often but which has great potential for harmful consequences. Many of the scores a student gets are weighted and they don't know how the weightings are formulated.

In law schools, for example, a few law schools essentially weight undergraduate schools then have the final score manipulated by the weight given. Georgetown University may have a list of scores of different schools and they weight the student's score by that score for the school he attended, and the student has no idea how he came up with that test score.

ETS keeps their records for a long time, and there is no provision to prevent disclosure of those records. We are recommending this very strongly. I don't think ETS has any major objection to our recommendations, at least they didn't say so in their testimony.

We are more concerned, however, as to the application process. Let me give you an example: One medical school's application process in their evaluation criteria uses such criteria as moral character and similar subjective criteria. They maintain they don't want to rely solely on testing scores. They solicit information as to the moral character of a student and that information goes into his record.

(A) That is subjective information in that no guidelines are given as to what is moral: and (B) it is a subjective evaluation by a third party. These evaluations may or may not play an important role, but since the admission process didn't publish what the rules are, how much any item of information will be weighted, how important it is relative to their grades or test scores, the student has to make an act of faith in the system and has no way of assuring his side of the story can get on the record.

I think there are problems in the application process which are very serious. The Commission, however, has a great deal of sympathy for universities who have an awesome choice to make. They are choosing between excellent students and it is a difficult process.

Chairman PERKINS. The only reason I referred to the law schools is, I think we would all regret to see the admission committee involved in courts all the time in trying to defend the situation. It would morally destroy the integrity of the admissions committee at that university or wherever it may be. But, at the same time, we want to give full protection to the rights of the students here. We want to make sure they are not discriminated against.

Mr. HIGGS. I would like to make a very important distinction. Nothing in our recommendation gives the students the right to question the process or the outcome of the decision. It merely gives him the right to see the record and put his side of the story on the record.

The injunctive relief doesn't apply to the equity of the decision.

Chairman **Perkins**. Would you like to respond to that?

Mr. **Steiner**. The underlying issue is control of the admissions process and what should be taken into account. I, myself, think there is nothing wrong in taking into account the moral character of applicants. For instance, we have not graduated a student who was in his fourth year of studies because of acts he committed. The medical board determined that he should not be certified to practice as a result of his moral standards.

Some universities and colleges might want to give very heavy weight to character or to one who smokes. I think it should be a prerogative. I can see it as a theory of education. I question whether it is sensible to have some national standard pushing universities to the so-called objective standards with all the weaknesses they demonstrate.

Inevitably, the judgment being made is that one candidate is basically stronger than the other. We are not really rejecting but selecting the ones who are the best among the others. If the interviewer strikes me as being straightforward and direct—what do you mean you get into some argument about that? We thought other candidates were better, that is why we selected them. The commission's report said it is designed to promote fairness. I think it is just going to create more bureaucracy and arguments.

Chairman **Perkins**. Mr. Quie.

Mr. **Quie**. Following up on that, what I understand from you is that Mr. McFee's office is not issuing regulations on how you rate applicants. However the mere fact that the applicant has the right to look at the subjective decisions in review of his application file will, in effect, remove some of the standards which are set; is that what you are saying?

Mr. **Steiner**. What I am saying is, if the right of waiver to see a letter is removed as recommended by the commission, we will see continuation of it and that will force the committee to rely on test scores and grades with all the inherent weaknesses which now exist.

I attached an example in my statement as to a student who was said to be lacking in social graces and being tactless. I think there is no chance at all that the teacher with an access letter and the student could get some sense of this person being a unique individual. However, he was admitted.

We want some people who are abrupt, who are loners, who speak their minds independently. We decided this was a strong candidate.

Mr. **Quie**. Is it better not to be sensitive to crude jokes? If so, the Secretary of Agriculture would have had real trouble, not the present one, the former one.

Let me ask, Mr. McFee, do you think you will continue to administer the Buckley amendment or is this going to be moved over to the educational department?

Mr. **McFee**. We have examined that issue within the department over the last couple of years and are still continuing to examine it. In fact, we have a study on the issue.

In all frankness, it is probably misplaced in the secretary's office as far as the content of the program. It was placed there, I think wisely so, by a former secretary while we were in a very disorganized state, when there was a lot of confusion surrounding the act. We needed almost a crisis management approach to the act.

As time has moved on and as the law becomes more routine, I think a strong case could be made that it would probably be more appropriately exercised along with the other commissioners' responsibilities.

We are arguing the pros and cons of it and, almost as an aside, a future separate department of education might be the final device that resolves that.

Mr. Quie. What bothers me is, we have a very difficult idea as to the Buckley amendment. By and large, the way HEW has handled this has been commendable.

I would wager if it had been put right into the Office of Education, we wouldn't have heard those same compliments. I am a little wary about transferring the function when somebody has really carried off the difficult task as well as you have.

That's just my biased impression.

Mr. Higgs, has your study commission looked at this whole question?

Mr. Higgs. We were extraordinarily impressed by our examination of HEW's performance and by the messages we got from everybody in the field, and we did not look into alternative organizational sites for monitoring responsibilites.

If I could just take a moment, I would like to clarify the record. I would agree with Mr. Steiner's notion that our objective was not to get the Federal Government into setting substantive standards for the decision process. We are interested in the fairness with which information is used. If the information went into a record at a religious institution that the applicant was a smoker, and he was not admitted because he was a smoker, does he ever have a chance to set the record straight if he is not a smoker? How would he find out? We would be perfectly willing to claim ignorance on whether or not smoking should be a criteria for the admission's process. We are concerned with the way information was used in support of that decision. It is not a question of the fairness in the decision process but of the way the information is structured for that decision.

Mr. Salett. I would like to add our praise to Messrs. Higgs, McFee and Mr. Steiner, the three administrators in HEW.

The word back from parents has been that they have been totally responsive and very fair in their dealings. We contract this with a statement from somebody in the Office of Education at the time of the passage of the act. It is not our law, we didn't ask for it, we will not enforce it, we will let the courts decide how it will be worked out. We felt at the time the Office of Education administering a law they so clearly didn't want, would have had very bad consequences for local districts and individual parents.

Mr. Quie. Let me ask you, in your survey, to what extent was there an attempt to secure information through a phone call or through a letter, with the assurance the letter would be destroyed as soon as it was seen so it wouldn't be passed on? To what extent is there an attempt to secure information? On the other hand, if we remove the opportunity for waiver, to what extent would that waiver be increased?

Mr. **Salett**. We didn't gather any information on that factor. Our major interviewees were parents and school administrators.

Mr. **Quie**. Do any of the others of you have any knowledge of that?

Mr. **McFee**. I may say the whole waiver issue is one which, after two and a half years of almost daily contact with this problem, we can't come up with any question pro and con as to the effect of open and closed letters of recommendation. It is a burning issue in the educational community. There are many arguments on openness as there are on confidential letters. I, personally, have great reservation as to making recommendations as to changing that procedure until we can have a much better assessment of the effects of that particular decision. It is clear the waiver has been used. The statement that our student witness read today is perfectly consistent, in our mind, with the law. The statement, as it read, didn't force the student to sign a waiver and I think the educational institution probably has the responsibility as it set forth in that brochure, as to their assessment of open and closed letters of recommendation.

Mr. Quie, I wish I had a good answer for you on this one but that will probably be the most difficult decision if this subcommittee addresses questions to Buckley in the upcoming session to find an agreement or consensus on that particular issue.

Mr. **Quie**. Thank you. The one comment I have is from dealing with staff individuals and so forth. I have a feeling that while it seems difficult for those who put in letters of recommendation and so forth, when there is something derogatory about a student, many times it is beneficial for the student to walk through and address the issue, but out of it there is a tremendous learning process. They have improved their opportunities for a life of success.

Mr. **Schirle**. I think it is part of the responsibilities of a professor to face these issues head on and not behind closed doors. It is part of his responsibility to openly and frankly assess a student's academic responsibilities.

Mr. **Blouin**. I understand none of the other members have questions.

I want to thank you for coming. We appreciate your tolerance. The subcommittee is adjourned until 9:00 tomorrow morning.

[Whereupon, at 10:45 o'clock p.m., the subcommittee was adjourned.]

APPENDICES

APPENDIX 1

GENERAL EDUCATION PROVISIONS ACT

TITLE IV, P.L. 91-230, as amended through 1976.

Section 400 . . .

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS[1]

Sec. 438. (a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the educational records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

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[1] Title II, Section 204(3) of P.L. 94-274 (enacted April 21, 1976, 90 Stat. 392, 393) provides that the period of July 1, 1976, through September 30, 1976 shall be treated as part of the fiscal year beginning July 1, 1975, for the purposes of Section 437(a) of the General Education Provisions Act.

[1] This section may be cited as the "Family Educational Rights and Privacy Act of 1974".

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution.

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purposes for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's educational records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records means", except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials, which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 408(c)), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection.

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit

and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) For the purposes of this section, whenever a student has attained eighteen years of age or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(20 U.S.C. 1232g) Enacted August 21, 1974, P.L. 93-380, sec. 513(a), 88 Stat. 571, 574; amended December 31, 1974, P.L. 93-568, sec. 2, 88 Stat. 1858, 1860.

PROTECTION OF PUPIL RIGHTS

SEC. 439. All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

(20 U.S.C. 1232h) Enacted August 21, 1974, P.L. 93-380, sec. 514(a), 88 Stat. 574.

LIMITATION ON WITHHOLDING OF FEDERAL FUNDS

SEC. 440. (a) Except as provided in section 438(b)(1)(D) of this Act, the refusal of a State or local educational agency or institution of higher education, community college, school, agency offering a preschool program, or other educational institution to provide personally identifiable data on students or their families as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance. Such a refusal shall also not constitute sufficient grounds for a denial of, a refusal to consider, or a delay in the consideration of, funding for such a recipient in succeeding fiscal years. In the case of any dispute arising under this section, reasonable notice and opportunity for a hearing shall be afforded the applicant.

(b) The extension of Federal financial assistance to a local educational agency may not be limited, deferred, or terminated by the Secretary on the ground of noncompliance with title VI of the Civil Rights Act of 1964 or any other nondiscrimination provision of Federal law unless such agency is accorded the right of due process of law, which shall include—

(1) at least 30 days prior written notice of deferral to the agency, setting forth the particular program or programs which the Secretary finds to be operated in noncompliance with a specific provision of Federal law;

(2) the opportunity for a hearing on the record before a duly appointed administrative law judge within a 60-day period (unless such period is extended by mutual consent of the Secretary and such agency) from the commencement of any deferral;

(3) the conclusion of such hearing and the rendering of a decision on the merits by the administrative law judge within a period not to exceed 90 days from the commencement of such hearing, unless the judge finds by a decision that such hearing cannot be concluded or such decision cannot be rendered within such period, in which case such judge may extend such period for not to exceed 60 additional days;

(4) the limitation of any deferral of Federal financial assistance which may be imposed by the Secretary to a period not to exceed 15 days after the rendering of such decision unless there has been an express finding on such record that such agency has failed to comply with any such nondiscrimination provision of Federal law; and

(5) procedures, which shall be established by the Secretary, to ensure the availability of sufficient funds, without regard to any fiscal year limitations, to comply with the decision of such judge.

(c) It shall be unlawful for the Secretary to defer or limit any Federal financial assistance on the basis of any failure to comply with the imposition of quotas (or any other numerical requirements which have the effect of imposing quotas) on the student admission practices of an institution of higher education or community college receiving Federal financial assistance.

(20 U.S.C. 12321) Encated August 21, [illegible]4, P.L. 93-380, sec. 515(a), 88 Stat. 574; amended October 12, 1976, P.L. 94-[illegible]2, Title IV, secs. 407, 408, 90 Stat. 2232, 2233.

APPENDIX 2

federal register

THURSDAY, JUNE 17, 1976

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

PART II:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

PRIVACY RIGHTS OF PARENTS AND STUDENTS

Final Rule on Education Records

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 99—PRIVACY RIGHTS OF PARENTS AND STUDENTS

Final Rule on Education Records

Notice of proposed rulemaking was published in the FEDERAL REGISTER on January 6, 1975 at 40 FR 1208 setting forth the requirements to be met by an educational agency or institution to protect the privacy of parents and students under section 438 of the General Education Provisions Act, as amended (added by section 513 of Pub. L. 93–380 and amended by section 2 of Pub. L. 93–568).

Three hundred and twenty-one letters of comment were received during the 60-day public comment period which closed on March 7, 1975. All comments were given consideration during the revision of the regulations, the first segment of which was published in final form on March 2, 1976 at 41 FR 9026. This document supersedes the previously published final regulation. The revoked regulation has been incorporated for republication at subparts A (Sections 99.2 and .3), C (Sections 99.21–23), and D (Sections 99.31 and .36) of this document, in order to provide the public with a single document containing all regulatory provisions pertaining to the Family Educational Rights and Privacy Act.

While the Department unquestionably supports the purpose of the law—to provide greater privacy safeguards to parents and students through the application of fair information practice—during the course of developing this final regulation it became evident that translating this intent into practice might create a number of problems. For our part, there was a conscious effort to mitigate any dislocating effects which the regulation might have and, at the same time, remain consistent with the statute.

We believe that some working experience with this regulation will be helpful to the Department in determining whether there is a need to modify this regulation or whether a recommendation for legislative change may be either necessary or appropriate.

As a result, the regulation is being issued in final form, effective upon publication, with the commitment that comments on the regulation and its operation, including its effect on the day-to-day activities of educational agencies and institutions during the 1976–77 school year, will be formally invited for a ninety-day period commencing July 1, 1977. These comments will be used in evaluating this regulation and will be shared with the Congress, as may be necessary, in order to improve the effects and effectiveness of the regulation and the statute upon which it is based.

In addition to welcoming comments on the substance of these regulations, the Department will also solicit public comment regarding the most appropriate means of enforcing the provisions of the Act. Regarding the means of enforcement available to the Department, while educational agencies and institutions are accountable for Federal funds they receive and must act in conformity with Federal law, the practice of using the expenditure of Federal funds as leverage may not be the most effective way to accomplish the objectives of this statute. We would be interested in your views as to whether other more appropriate means of enforcement than institutional funds cutoff are or should be available.

ANALYSIS OF EARLIER COMMENTS

A summary of the major comments received follows in order of the sections numbered as in the final regulations. Each summary of comments is followed by a response which indicates whether or not a change has been made in the regulations. Technical changes, such as the renumbering of sections, are listed under other changes at the end of each section or subpart.

SUBPART A—GENERAL

1. Section 99.1 *Applicability of part.*

Comment. A commenter suggested that the determination as to whether or not an educational agency or institution would be required to comply with section 438 of the Act and this part should be based on the actual receipt of funds and not on whether funds have been made available under an applicable program.

Response. Sections 438 (a)(1)(A), (a)(2), (b)(1), and (b)(2) state that "No funds shall be made available under any applicable program to any educational agency or institution * * *"; therefore, no change has been made in the regulations. However, the term "available" should be read in this context as referring to funds which have been obligated by the U.S. Commissioner of Education.

Comment. Several commenters indicated that it would be helpful to have a list of Federal programs administered by the U.S. Commissioner of Education. One commenter suggested that the list of programs be published as a part of the regulations.

Response. It was determined that it would not be feasible to publish a list of Federal programs administered by the Commissioner as a part of the regulations because any such list would be subject to change and tends to become out-of-date soon after it is published.

A list of programs administered by the Commissioner as of March 1975 was published at 40 FR 10543–5 (March 6, 1975) and is available as a reprint from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

Comment. Several commenters indicated they felt that if an educational agency or institution or students in attendance at the educational agency or institution received funds under any Federal program, the agency or institution should be required to comply with section 438 of the Act and this part.

Response. The statutory language limits coverage to educational agencies and institutions to which funds are made available under programs administered by the U.S. Commissioner of Education. Section 438 was an amendment to Part C of the General Education Provisions Act, as amended. Section 421 of Part C states that:

> The provisions of this part shall apply to any program for which the Commissioner has administrative responsibility, as specified by law or by delegation of authority pursuant to law.

In addition, the *Joint Statement in Explanation of Buckley/Pell Amendment* (*Congressional Record* at S. 21488, daily edition, December 13, 1974) stated in part:

> * * * by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration * * * there has been some question as to whether the amendment's provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act's coverage should be clear.

Comment. A commenter asked if an educational agency or institution would be required to comply with Section 438 of the Act and this part if students in attendance at the agency or institution received funds under an applicable program administered by the Commissioner, such as the Basic Educational Opportunity Grant program, the Direct Student Loan program, or the Supplemental Educational Opportunity Grant program.

Response. Section 99.1, as revised, makes it clear that Section 438 applies to an agency or institution which either receives funds directly from the Office of Education, or which has students in attendance who receive funds from the Office of Education. For example, Section 438 would apply to an agency or institution which receives funds under the College Work-Study program, the Supplemental Opportunity Grants program, or the National Direct Student Loan program, or which has students who receive funds under the Basic Educational Opportunity Grant program or the guaranteed Student Loan program.

2. Section 99.3 *Definitions.*

Comment. Several commenters asked for clarification as to whether directory information included only the enumerated information, or if additional information could be designated as directory information.

Response. The definition of directory information has been modified to conform with the statutory definition; that is, that it "includes" the enumerated information. For guidance as to what further information could be included, the phrase "* * * and other similar information" has been added to the definition.

Comment. Several commenters recommended that the definition of education records be changed. The single suggestion most often made was that the term "school records" be used in place of "education records," and that school records and non-school records be defined by their origin.

Response. Section 438(a)(4)(A) defines education records as "* * * those records, files, documents, and other materials which * * * contain information directly related to a student; and * * * are maintained by an educational agency or institution, or by a person acting for such agency or institution." Section 438 (a)(4)(B) (i) through (iv) list those records which are not considered to be education records if conditions are adhered to by an educational agency or institution in the maintenance of the records. The statute does not provide for a differentiation between records maintained by an educational agency or institution based on the origin of those records.

Comment. Several commenters asked for clarification regarding what was meant by "institutional" in the definition of education records at section 438(a)(4)(B)(i).

Response. The word "institutional" appeared incorrectly in the copy of section 438 of the Act reprinted as a part of the proposed rules. The correct word was "instructional". The phrase at section 438 (a)(4)(B)(i) should have stated "* * * records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, * * *"

Comment. Several commenters asked that the term "substitute" used in the definition of education records be defined.

Response. The term "substitute" in the definition of education records has been defined as "* * * an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position."

Comment. Several commenters asked for clarification as to what was meant by "same jurisdiction" in the definition of education records at section 438(a)(4)(B)(ii).

Response. Since the meaning may vary under applicable State law and factual situation, no attempt has been made to define by regulation the term "same jurisdiction."

Comment. Several commenters asked that the term "financial aid" be defined in the regulations.

Response. A definition of "financial aid" has been included. The definition states "a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution."

Comment. Several commenters asked for clarification regarding who could exercise parental rights and responsibilities on behalf of a student. Particular concern was expressed about whether a foster parent or other individual could act on behalf of a student.

Response. The definition of "parent" has been modified to include, in stated instances, an individual who may not be the legal guardian of a student. The definition as revised states " 'Parent' includes a parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that a State law, a court decree, or a legally binding instrument provides to the contrary.

Comment. A commenter suggested that an exception to the definition of "education records" be added for nonacademic records kept by seminaries. The commenter indicated that seminaries and schools or departments of divinity or theology which are part of a college or university may maintain records on candidates for the priesthood or ministry, rabbinite, or religious orders. These records contain information on the spiritual and psychological development of such persons, and pertain to their suitability for the ministry, rabbinate or religious order, rather than to their educational performance. The commenter argued that the requirements of the Act should not apply to such records. Additionally, the commenter stated that the regulations should "exclude the application of the law when grants to the university complex do not aid the seminary."

Response. As is made clear in the definitions of "education records", "student", and "educational agency or institution" contained in the Act, section 438 applies generally to all records directly relating to a student which are maintained by any part of an educational agency or institution which receives funds from programs for which the Commissioner has administrative responsibility. However, whether section 438 covers the type of record described by the commenter, or applies to the recordkeeping policies of schools of divinity or theology which are part of an educational institution, may involve complex constitutional questions and interpretations of Supreme Court decisions. For this reason, such issues will be considered closely on a case-by-case basis as they arise, but will not at this time be addressed by regulation.

Comment. Several commenters asked if the definition of a student was intended to include or exclude certain individuals, such as former students.

Response. A new definition of student is provided which adopts much of the language used in section 438(a)(6). The definition states " 'Student' * * * includes any individual with respect to whom an educational agency or institution maintains education records."

Other Changes. A definition has been added for "disclosure." The terms "access" and "release" previously used to distinguish between disclosure to a parent or student and disclosure to a third party, respectively, generated confusion easily avoided by the use of the new single term to cover both situations.

The definition of "office and review board" has been deleted because the functions are explained under Subpart E—Enforcement.

The definition of "panel" has been modified in order to avoid any confusion between a panel and the review board. A panel is a subunit of the review board designated to conduct a hearing.

3. Section 99.4 *Student rights.*

Comment. Several commenters indicated they felt that parents had a right to receive information pertaining to their son or daughter, particularly grade reports, even if their son or daughter was eighteen years of age and attending an institution of postsecondary education, since in many cases the parents were paying for the postsecondary education of their son or daughter.

Response. Section 438(d) states that:

> * * * "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the students shall thereafter *only* be required of and accorded to the student. (Emphasis added.)

Since this is a right provided by statute no change has been made in the regulations. An institution of postsecondary education is permitted by section 438 of the Act and this part to disclose information pertaining to an eligible student to the parents of the eligible student with the prior written consent of the eligible student or without the prior written consent of the eligible student if that student is a dependent as defined under section 152 of the Internal Revenue Code of 1954.

Comment. Three commenters suggested that there was an apparent conflict between sections 99.4(a) and 99.30(h) of the proposed rules (99.30(h) has been renumbered section 99.31(a)(8)) and asked for clarification.

Response. A new section 99.4(b) has been added to provide clarification and section 99.4(b) of the proposed rules has been redesignated section 99.4(c). Section 99.31(a)(8) permits, but does not require, an institution of postsecondary education to disclose information contained in the education records of an eligible student to the parents of the eligible student if that eligible student is a dependent as defined under section 152 of the Internal Revenue Code of 1954. Section 99.4(b) states that the status of an eligible student as a dependent of his or her parents for purposes of section 99.31 (a)(8) does not otherwise affect his or her rights under section 438 of the Act and this part.

4. Section 99.5 *Formulation of institutional policy and procedures.*

Comment. Several commenters indicated they felt that the notice requirement under section 99.5 of the proposed rules was too burdensome. The commenters, in most cases, did not object to the requirement that notice be provided to parents of students or eligible students, but they did object to the effect of the inclusion of certain items in the notice under section 99.5(b) on the size of the document.

Response. The amount of information required to be given to parents of students and eligible students for annual notification purposes under section 99.5 of the proposed rules has been reduced. A new section 99.6 *Annual notification of rights* has been added to the regulations.

Comment. A commenter stated that a basic requirement of the regulations should be that each educational agency or institution adopt a policy which is consistent with the requirements of section 438 of the Act and this part. The commenter pointed out that sections 438 (a)(1)(A), (b)(1) and (b)(2) contain explicit references to an educational agency or institution being required to adopt policies, and that sections 438 (a)(2), (a)(5)(B), (b)(4)(A), and (e) contain implicit references to the need for an educational agency or institution to adopt policies.

Response. New section 99.5 *Formulation of institutional policy and procedures* requires that each educational agency or institution formulate and adopt a policy consistent with the minimum requirements of section 438 of the Act and this part. The policy is to be in writing, and copies are to be made available upon request to parents of students or eligible students.

Comment. Several commenters indicated that the requirement under section 99.5(c) of the proposed rules that an educational agency or institution provide the required notification in the language of the parents of a student or an eligible student was, in many cases, inappropriate. Institutions of postsecondary education pointed out that since proficiency in the English language is a condition for admission to postsecondary institutions in the United States the requirement to provide notification to an eligible student in his or her language made little or no sense.

Response. The requirement in section 99.5(c) of the proposed rules has been modified. New section 99.6(b) requires that each agency or institution of elementary and secondary education, when developing a policy of informing parents of students of their rights, provide for the need to effectively notify parents identified as having a primary or home language other than English. The requirement that an institution of postsecondary education provide notification in the language of the eligible student has been deleted from the regulations.

Comment. Several commenters indicated they felt that the requirements in section 99.5(b) of the proposed rules were excessive. The commenters were particularly concerned about the requirement that an educational agency or institution publish the name of the official who has been designated as responsible for each type of education record. They pointed out that the name was likely to change because different individuals would be appointed over a period of time. The commenters also expressed concern about attempting to list the persons who would have access to education records. They stated that it would be difficult, in advance, to specify all of the individuals who might have a need for access to education records.

Response. The requirement in section 99.5(b) of the proposed rules regarding the official who has been designated by the educational agency or institution as responsible for each type of record has been modified. New section 99.5(a)(2)(iv) requires that the policy adopted by an educational agency or institution of informing parents of students or eligible students of the types of education records maintained by the agency or institution specify the title and address of the individual who has been designated as responsible for each type of record. The requirement to specify the name of the individual has been deleted from the regulations.

The requirement in section 99.5(b) of the proposed rules regarding the listing of persons who have access to education records has been deleted from the regulations. New section 99.5(a)(3) requires that the policy adopted by an educational agency or institution includes a specification of the criteria that the agency or institution will use for determining which parties are "school officials" and what is considered to be a "legitimate educational interest."

5. Section 99.6 *Annual notification of rights and policy.*

Comment. Several commenters asked for clarification regarding the means to be used by an educational agency or institution to provide the notification required by section 99.5(a) of the proposed rules. The specific question most often asked was whether notification must be provided on an individual basis to parents of students or to eligible students, or whether the notification could be published in a student handbook, school catalog, or student newspaper, or posted on bulletin boards at the school. Two commenters indicated that it was unclear as to whether notification was to be provided to former students as well as to students currently in attendance at an educational agency or institution.

Response. New section 99.6 states that the annual notification of rights and policy shall be "* * * by such means as are reasonably likely to inform parents or eligible students. * * *" The determination as to the actual means to be used is to made by each educational agency or institution. Some agencies and institutions may decide to provide notification on an individual basis; others may decide to publish the notification in a student handbook, school catalog, or student newspaper, or to post it on bulletin boards at the school. It was felt that the regulations should specify the criteria to be used in selecting a means of notification, but not the actual means of notification since the means may vary from agency to agency and institution to institution. In addition, new section 99.6 states that the notification is to be provided to parents of students in attendance or to eligible students in attendance at an educational agency or institution; therefore, making it clear that the notification of rights and policy need not be provided to former students or their parents.

Comment. Several commenters indicated they felt that the requirement for an educational agency or institution to provide notification on an annual basis was excessive. One commenter suggested that notification should be provided on a one-time basis at the time that a student enrolled in the educational agency or insitution.

Response. It was determined that the requirement for an educational agency or institution to provide notification on an annual basis was not excessive. Educational agencies and institutions generally issue or distribute student handbooks or school catalogs at the first of each school year. The notification could, in many instances, be a part of a handbook or catalog. Institutions of elementary and secondary education often send letters or distribute bulletins to parents of students at the start of each school year in order to inform them of the school's policies. The notification could, in these instances, be included in the letters or bulletins. It was felt that notification on a one-time basis at the time that a student enrolled in an educational agency or institution was not sufficient to inform parents of students or eligible students of their rights. No change has been made in the requirement.

Comment. Several commenters stated they felt that the requirement under section 99.5(b)(1) of the proposed rules to provide notification to parents of students or to eligible students as to the types of education records maintained by the educational agency or institution was excessive in that it was not specifically required by section 438 of the Act.

Response. New section 99.6(a) states that each educational agency shall provide notification to parents of students or eligible students which is reasonably likely to inform them of their rights under the Act and this part. As was previously stated in the comment section which followed section 99.5 of the proposed rules, it was determined that it was essential to require that each educational agency or institution identify the types of education records maintained by it, so that parents of students or eligible student would be able to decide which education records they wished to inspect and review. A similar, but less burdensome listing of the information required by section 99.5(b)(1) of the proposed rules is required under new section 99.5(a)(2)(iv) to be included in the policy and procedures of the educational agency or institution.

Comment. A commenter recommended that each educational agency or institution be required to inform parents of students or eligible students of the right to file a complaint with the Department of Health, Education, and Welfare concerning an alleged failure by the agency or institution to comply with section 438 of the Act and this part.

Response. The right to file a complaint with the Department of Health, Education, and Welfare concerning an alleged failure by an educational agency or institution to comply with section 438 of the Act is one of the rights which parents of students or eligible students must be informed of under section 438(e).

6. Section 99.7 *Limitation on waivers.*

Comment. A commenter asked for clarification regarding whether or not an eligible student was permitted to waive the right to inspect and review information, other than confidential letters and statements of recommendation, contained in his or her education records.

Response. Section 438(a)(1)(C) states that "A student or person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B). * * *" The confidential recommendations described in section 438(a)(1)(B)(iii) are of three types "* * * respecting admission to any educational agency or institution * * * respecting an application for employment, and * * * respecting the receipt of an honor or honorary recognition." The *Joint Statement in Explanation of Buckley/Pell Amendment* (*Congressional Record*, at S. 21489, daily edition, December 13, 1974) states in part, "And students may waive their right of access to confidential recommendations in three areas—admissions, job placement, and receipt of awards." The statutory language, in light of the joint statement, would not preclude an eligible student from waiving his or her right to inspect and review; however, an educational agency or institution may not require that any right accorded by the Act be waived.

Comment. Several commenters asked if there was any limit on the period of time which a waiver could be considered to be in effect, and if a waiver provided by an eligible student could be revoked by that student at a later time.

Response. Nothing in section 438 of the Act or this part sets any limit on the period of time that a waiver shall be considered to be in effect. An eligible student may waive his or her right to inspect and review a confidential letter or statement of recommendation provided by a specific individual, or confidential letters and statements of recommendation provided for a specific purpose. The waiver will be considered to be in effect as long as the letters or statements of recommendation are maintained in the education records of the student. If an eligible student waives his or her right to inspect and review a specific class of letters and statements of recommendation, such as recommendations respecting employment, and later decides to revoke that waiver, the student would be able to inspect only those letters and statements of recommendation respecting employment which were placed in his or her education records after the date that the waiver was revoked.

Comment. A commenter asked what would happen if an eligible student had waived his or her right to inspect and review confidential letters and statements of recommendation provided for a specific purpose if these letters and statements were subsequently used for a different purpose.

Response. Section 438(a)(1)(C) states that "* * * [a] waiver shall apply only if * * * such recommendations are used solely for the purpose for which they were specifically intended." If an eligible student has waived his or her right to inspect and review confidential letters and statements of recommendation provided for a specific purpose, and these letters and statements of recommendation are subsequently used for a different purpose, the waiver would be considered void, and the eligible student would have the right to inspect and review the letters and statements of recommendation.

Other Changes. Section 99.6 of the proposed rules has been renumbered section 99.7.

7. Section 99.8 *Fees.*

Comment. Several commenters asked if an educational agency or institution could charge a fee for copies of education records.

Response. New section 99.8 states that an educational agency or institution may charge a reasonable fee for copies of education records which are made for parents of students, students, or eligible students.

SUBPART B—INSPECTION AND REVIEW OF EDUCATION RECORDS

8. Section 99.11 *Right to inspect and review education records.*

Comment. A commenter suggested that language be added to section 99.11 stating that when parents are separated or divorced and one parent has been given custody of their child by agreement or a court order that both natural parents will have the right to inspect and review the education records of their child.

Response. Nothing in section 438 of the Act and this part is intended to affect the status of an agreement or court order under applicable State law regarding the custody of a child, or the exercise of rights on behalf of a child by separated or divorced parents. Paragraph (c) has been added to clarify this position.

Comment. A commenter recommended that the regulations state that an official of an educational agency or institution has a right to be present whenever the parent of a student or an eligible student inspects and reviews the education records of the student.

Response. The determination as to whether or not an official of the educational agency or institution will be present whenever the parent of a student or an eligible student inspects and reviews the education records of the student has been left up to each educational agency or institution. Nothing in section 438 of the Act or this part would preclude an educational agency or institution from adopting a policy which would require the presence of an official during the inspection and review of education records, if that policy would not operate to effectively prevent the exercise of rights by the parent or student.

Other Changes. New section 99.11 incorporates requirements from sections 99.13 and 99.15 of the proposed rules. The requirement that an educational agency or institution comply with a request to inspect and review education records within a reasonable period of time, but in no case more than forty-five days after the request has been made has been incorporated into section 99.11(a). Section 99.13 (c) and (d) of the proposed rules have been incorporated as sections 99.11(b) (1) and (2) of the regulations. This change was made in order to consolidate provisions pertaining to the right to inspect and review education records in one section.

9. Section 99.12 *Limitations on right to inspect and review education records.*

Comment. Several commenters objected to confidential letters and statements of recommendation which were placed in the education records of an eligible student before January 1, 1975 being exempted from inspection and review by the eligible student.

Response. Section 438(a)(1)(B) states that:

> The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education * * * confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975. * * *

No change has been made in the regulations.

Comment. Several commenters objected to an eligible student being able to inspect and review letters and statements of recommendation which were placed in his or her education records after January 1, 1975. Two commenters felt that if letters and statements of recommendation were open to inspection and review by an eligible student it would be difficult for an individual who had been asked to write a recommendation to provide an honest assessment of the eligible student's abilities.

Response. Section 438(a)(1)(A) states that the parent of a student or an eligible student has the right to inspect and review the education records of the student. Section 438(a)(1)(C) permits an individual who is an applicant for admission to an agency or institution of postsecondary education or is a student in attendance at an agency or institution of postsecondary education to waive his or her right to inspect and review confidential recommendations respecting admission to an educational agency or institution, respecting an application for employment, and respecting the receipt of an honor or honorary recognition as long as certain conditions are met by the educational agency or institution including that:

> Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

No change has been made in the regulations. But additional waiver provisions were added.

Comment. Several commenters asked for clarification regarding whether or not an applicant for admission to an educational agency or institution has a right to inspect and review education records.

Response. The right to inspect and review education records is provided to the parent of a student or an eligible student. An applicant for admission to an educational agency or institution who is unsuccessful in his or her application may not be considered a student for purposes of section 438 of the Act or this part. The definition of student at section 438(a)(6) states in part: "* * * student * * * does not include a person who has not been in attendance at such agency or institution."

10. Section 99.13 *Limitation on destruction of education records.*

Comment. A commenter stated that an educational agency or institution should be permitted to destroy education records after a specified period of time.

Response. Generally, educational agencies and institutions are not precluded from destroying records unless there is an outstanding request to inspect and review them. The length of time which education records are required to be maintained by an educational agency or institution is, in many cases, determined under applicable State law or agency or institutional regulations. No change has been made in the regulations.

Comment. A commenter recommended that each educational agency or institution be required to provide notification to parents and eligible students 60 days in advance of the destruction of any education records.

Response. Nothing in section 438 of the Act and this part would preclude an educational agency or institution adopting a policy of providing notification to parents of students, and eligible students prior to the destruction of any education records. Such a requirement might work an undue burden on educational agencies or institutions which, though having a policy of destroying certain materials, purge records on a day-to-day basis rather than on a fixed schedule. No change has been made in the regulations.

Other Changes. Section 99.14 of the proposed rules has been renumbered section 99.13. Section 99.15 of the proposed rules has been deleted because it was redundant. Sections 99.13 (c) and (d) were redesignated sections 99.11 (b)(1) and (b)(2). The other paragraphs in section 99.13 have been deleted because they were redundant.

SUBPART C—AMENDMENT OF EDUCATIONAL RECORDS

11. Section 99.20 *Request to amend education records.*

Comment. Several commenters indicated they were concerned that an educational agency or institution might use the informal proceedings under section 99.21 of the proposed rules to delay in providing the parent of a student or an eligible student with an opportunity for a hearing to seek the correction of education records.

Response. Section 99.21 of the proposed rules has been deleted. New section 99.20 states that if a parent of a student or an eligible student believes that information in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student, the parent or the eligible student may request that the educational agency or institution amend the records. The educational agency or institution must decide whether to amend the education records within a reasonable period of time of receipt of the request. If the educational agency or institution decides to refuse to amend the education records of the student, the agency or institution must inform the parent of the student or the eligible student of the right to a hearing. If concerned that the educational agency or institution is utilizing informal attempts to reconcile differences as a delaying tactic, the parent or eligible student may exercise his right to a hearing without benefit of the decision from any informal proceeding.

12. Section 99.21 *Right to a hearing.*

Comment. A commenter suggested that the right to a hearing to seek the correction of information contained in the education records of a student be limited to permanent education records which are not more than three years old.

Response. The statute does not provide for such a time limitation. Section 438(a)(2) states that:

> the parents of students who are or have been in attendance at a school of such agency or such institution are provided an opportunity for a hearing * * * to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students * * *

In addition, the fact that the right is provided to parents of students "who * * * have been in attendance * * *" as well as to parents of students "who * * * are in attendance. * * *" makes it clear that the right to a hearing may not be denied because the education records are more than three years old. The purpose of the hearing is "to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained * * *" in the education records of a student regardless of when the information was entered in the education records. No change has been made in the regulations.

Comment. A commenter recommended it be made explicit that when an educational agency or institution finds that information contained in the education records of a student is inaccurate, misleading, or otherwise inappropriate that the information must be corrected or deleted from the education records.

Response. New section 99.21(b) states that if, as a result of a hearing, an educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, the agency or institution shall amend the education records of the student accordingly, and so inform the parent of the student or the eligible student in writing.

Comment. A commenter requested clarification regarding whether or not a hearing could be requested by a parent of a student or an eligible student to contest the assignment of a grade.

Response. A hearing may not be requested by a parent of a student or an eligible student to contest the assignment of a grade; however, a hearing may be requested to contest whether or not the assigned grade was recorded accurately in the education records of the student. The *Joint Statement in Explanation of Buckley/Pell Amendment* (*Congressional Record* at S 21488, daily edition, December 13, 1974) stated in part:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given a student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to this law contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade.

Other Changes. Section 99.20 of the proposed rules has been renumbered section 99.21.

14. Section 99.22 *Conduct of the hearing.*

Comment. Several commenters expressed concern that the standards for the conduct of a hearing did not adequately satisfy due process requirements. The commenters recommended the inclusion of additional requirements to protect parents and students such as: (1) specifying the period of time within which educational agencies or institutions must hold a hearing, (2) requiring that the hearing be held at a time and place convenient for the parent or student, (3) permitting the parent or student to be assisted by an attorney or other representative of his or her choice, (4) providing the parent or student with an opportunity to present evidence relevant to the issues, (5) requiring that the hearing be conducted by an official who is not an employee of the school, agency, or institution, (6) requiring that the hearing be conducted and the decision be provided in the primary language of the parent or student, and (7) requiring that the decision be based solely on evidence presented at the hearing.

Response. New section 99.22 includes many, but not all of the recommended requirements. In some instances the recommended requirements have been modified. Section 99.22(a) states that the parent of a student or an eligible student shall be given notice of the date, place and time reasonably in advance of the hearing. An educational agency or institution must make a reasonable effort to schedule the hearing at a time and place which is convenient for the parent or eligible student and conduct the hearing in a manner that will not effectively prevent the exercise of the parents' or students' rights.

Section 99.22(c) states that a parent of a student or an eligible student shall be afforded a full and fair opportunity to present evidence which is relevant to the issues, and that a parent or an eligible student may be assisted or represented by an individual of his or her choice at his or her own expense, including an attorney.

Section 99.22(e) states that the decision of an educational agency or institution shall be based solely upon the evidence presented at the hearing. In addition, the decision must include a summary of the evidence and the reasons for the decision.

It was determined that it was not feasible to set a specific period of time within which each educational agency or institution must hold a hearing. It was felt that the requirement under section 99.22(a) that a hearing be held within "* * * a reasonable period of time after the educational agency or institution has received the request * * *" when combined with the requirement under section 99.5(a)(5) that each educational agency or institution specify, as part of the policy it is required to formulate and adopt, the reasonable time limits under which it shall be obligated to act under the requirements of section 99.22(a) provides adequate protection to parents and students.

It was determined that the requirement that the hearing be conducted by an agency or institutional official or other party, who does not have a direct interest in the outcome of the hearing, provides adequate protection to parents and students. Nothing in section 438 of the Act or this part would preclude an educational agency or institution from employing a hearing examiner to conduct the hearing; however, the decision to abide with the determination of the hearing examiner must be the decision of the educational agency or institution.

It was determined that the requirement that an educational agency or institution conduct a hearing and provide the decision in the primary language of the parent or student would in many cases be burdensome. A parent or an eligible student has a right under section 99.22(c) to "* * * be assisted or represented by individuals of his or her choice at his or her own expense. * * *" If a parent of a student does not speak English he or she could also be assisted by another individual who is qualified to serve as an interpreter. An educational agency or institution which serves students in an area where the primary or home language of the parents and students is a language other than English, is encouraged, but not required, whenever possible to conduct the hearing and provide the decision in the primary or home language of the parents and students.

Other Changes. Section 99.22 of the proposed rule entitled *Formal proceedings* has been retitled *Conduct of the hearing.*

SUBPART D—DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION FROM EDUCATIONAL RECORDS

15. Section 99.30 *When prior consent for disclosure required.*

Comment. Several commenters objected to the requirement that the names of the parties to whom information from the education records of a student is to be disclosed must be included as a part of the written consent.

Response. The requirement to include the names of the parties to whom information from the education records of a student is to be disclosed has been deleted. New section 99.30(c) states that the written consent must indicate "* * * the party or class of parties to whom the disclosure may be made."

Comment. Two commenters objected to the requirement that the consent to disclose information from the education records of a student must be a written consent.

Response. This is a statutory requirement. Section 438(b)(2)(A) specifies that information from the education records of a student may not be disclosed, except to particular parties or under particular circumstances, unless "* * * there is written consent from the student's parents * * *" No change has been made in this requirement.

Comment. Several commenters indicated that it would be extremely difficult for an educational agency or institution to determine if a parent, particularly in the case of separated or divorced parents, has the authority to give consent for the disclosure of information from the education records of his or her child.

Response. New section 99.30(b) states that whenever written consent is required for the disclosure of information from the education records of a student, an educational agency or institution may presume that a parent of a student giving consent has the authority to do so, unless the agency or institution has been provided with evidence that the parent does not have the authority under applicable State law.

Comment. Several commenters indicated they felt that the requirement in section 99.33(c) of the proposed rules, which provided that when an institution was a guardian for a student an independent party must be appointed to consent to the disclosure of information from the education records of a student was inappropriate.

Response. The requirement that an independent party be appointed to consent to the disclosure of information from the education records of a student has been deleted. If an institution has been appointed the guardian of a student under applicable State law, the institution may exercise the rights provided to the parent of a student, unless it is precluded from doing so by another Federal or State statute.

Other Changes. New section 99.30 *When prior consent for disclosure required* incorporates material which appeared in sections 99.31 *Content of Consent* and 99.33 *Authority of parent to give consent.*

16. Section 99.31 *When prior consent for disclosure not required.*

Comment. Several commenters indicated they felt that there were additional individuals, institutions, agencies, or organizations to whom information from the education records of a student should be disclosed without the need for obtaining the written consent of a parent of a student or an eligible student.

Response. Section 438(b)(1)(A) through (I) specifies the individuals, institutions, agencies, or organizations to whom or circumstances under which information from the education records of a student may be disclosed without the written consent of a parent of a student or an eligible student. Since this is determined by statute no change has been made in the regulations.

Comment. Several commenters requested clarification regarding who would decide which school officials could obtain information from the education records of a student without the written consent of a parent of a student or an eligible student because the official had a "legitimate educational interest" in the receipt of the information.

Response. Section 438(b)(1)(A) specifies that an educational agency or institution may disclose information from the education records of a student without the written consent of a parent of a student or an eligible student to "* * * other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests; * * *." Section 99.5(a)(3) indicates that each educational agency or institution include as a part of the policies and procedures * * * a specification of the criteria for determining which parties are 'school officials' and what the educational agency or institution considers to be a 'legitimate educational interest', * * *."

Comment. Two commenters asked for clarification regarding to whom and for what purposes a disclosure of information from the education records of a student could be made in connection with financial aid without the written consent of a parent of a student or an eligible student.

Response. New section 99.31(a)(4) specifies that a disclosure of information from the education records of a student may be made without the written consent of a parent of a student or an eligible student if the disclosure is to a party which is the source of or administers the financial aid for which a student has applied, if the information is required to determine the eligibility of the student for the financial aid, or to enforce the terms of the financial aid award.

Comment. Several commenters asked for clarification regarding the exception which allows an institution of postsecondary education to disclose information from the education records of an eligible student to a parent if the eligible student is a dependent.

Response. Section 438(b)(1)(H) permits, but does not require, an educational agency or institution to disclose information from the education records of an eligible student to a parent if the eligible student is a dependent as defined in the Internal Revenue Code of 1954. If an educational agency or institution decides to adopt a policy of disclosing information from the education records of a dependent eligible student, the agency or institution will need to establish a procedure for determining whether or not the eligible student is a dependent as defined by the Internal Revenue Code. Some educational agencies or institutions may decide to ask an eligible student at the time of registration whether or not he or she is a dependent of his or her parents; other educational agencies or institutions may decide to require that a parent submit an affidavit stating that the eligible student is a dependent for income tax purposes. Nothing in section 438 of the Act or this part requires that a particular procedure be adopted for the purpose of establishing dependency.

Comment. Several commenters indicated that in many instances it would be difficult for an educational agency or institution to notify a parent of a student or an eligible student, particularly the parent of a former student or a former eligible student, of the receipt of a judicial order or subpoena in advance of the compliance therewith. Two commenters suggested that the requirement be that an educational agency or institution make a reasonable effort to provide the notification in advance of complying with the judicial order or subpoena.

Response. New section 99.31(a)(9) states that an educational agency or institution must make "* * * a reasonable effort to notify the parent of a student or the eligible student of the order or subpoena in advance of compliance therewith; * * *."

Comment. Several commenters asked for clarification as to whether an educational agency or institution was required to disclose information from the education records of a student in those cases where the information could be disclosed without the written consent of a parent of a student or an eligible student.

Response. New section 99.31(b) states that "This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section."

Other Changes. Section 99.31 *When prior consent for disclosure not required* incorporates material which appeared in Section 99.36 *Consent* of the proposed rules.

17. Section 99.32 *Record of disclosures required to be maintained.*

Comment. Several commenters objected to the requirement that an educational agency or institution maintain a record of parties who had requested, as well as those who had obtained, information from the education records of a student.

Response. Section 438(b)(4)(A) requires that an educational agency or institution

> maintain a record, kept with the education records of each student, which will indicate all individuals, * * * agencies, or organizations which have requested or obtained access to a student's education records * * *.

The statute requires that a record be maintained of those parties who have "requested" information as well as those to whom information has been disclosed. No change has been made in the regulations.

Comment. A commenter asked for clarification regarding whether a record must be maintained of a disclosure of information to a parent of a student or an eligible student of information contained in the education records of the student.

Response. New section 99.32(a) (replacing proposed section 99.28) has been modified to make it clear that an educational agency or institution need not maintain a record of a disclosure of information to a parent of a student or an eligible student of information from the education records of the student.

Comment. Several commenters requested clarification as to whether or not an educational agency or institution is required to maintain a record of the disclosure of directory information.

Response. Section 99.32(a) makes it clear that an educational agency or institution is not required to maintain a record of the disclosures of directory information. Section 99.37 sets forth the requirements to be adhered to in the disclosure of directory information.

Comment. Two commenters asked for clarification regarding how long the record of disclosures of information contained in the education records of a student must be retained by an educational agency or institution.

Response. The record of disclosures of information contained in the education records of a student is considered to be a part of the education records of a student; therefore, the record of disclosures must be retained as long as the education records of a student to which they relate are maintained by an educational agency or institution.

Other Changes. Section 99.28 *Record of access* of the proposed rules has been renumbered and retitled section 99.32 *Record of disclosures required to be maintained.*

18. Section 99.33 *Limitations on redisclosure.*

Comment. A commenter asked for clarification as to whether information contained in the education records of a student which is disclosed to a centralized personnel bureau could be referred to various offices which might wish to consider a student for employment.

Response. Section 99.33(a) (proposed 99.30) makes it clear that when information contained in the education records of a student is disclosed to an institution, agency, or organization the information may be used by its officers, employees, and agents; but only for the purpose for which the disclosure was made.

Comment. A commenter asked for clarification regarding whether information disclosed from the education records of a student to a third party before the effective date of section 438 of the Act could be redisclosed without the written consent of a parent of a student or an eligible student.

Response. The statutory requirement that an educational agency or institution not release information to a third party except on the condition that the information not be redisclosed without the written consent of the parent or eligible student was not operative until the effective date of the Act. The condition cannot, therefore, be imposed with respect to information released prior to the effective date of the Act.

Comment. A commenter suggested that an educational agency or institution be required to obtain a written assurance from a third party that the party will not disclose any information from the education records of a student without the written consent of a parent of a student or an eligible student.

Response. Section 99.33(b) which provides a procedure to meet the requirement of section 438(b)(4)(B) requires that each educational agency or institution inform a third party to whom information from the education records of a student is disclosed that the third party may not disclose any information without the written consent of a parent of a student or an eligible student. However, nothing in section 438 of the Act or this part would preclude an educational agency or institution from adopting a policy of requiring a written assurance from a third party before disclosing information from the education records of a student.

Other Changes. Section 99.30 *Transfer of information by third parties* in the proposed rules has been renumbered and retitled section 99.33 *Limitations on redisclosure.*

19. Section 99.34 *Conditions for disclosure to officials of other schools and school systems.*

Comment. Several commenters indicated that it would be extremely difficult for an educational agency or institution to notify a parent of a student or an eligible student of the transfer of the education records of a student to another agency or institution, because usually the educational agency or institution did not have a new address for the parent or eligible student.

Response. New Section 99.34(a) requires that each educational agency or institution transferring the education records of a student make a reasonable effort to notify a parent of a student or an eligible student of the transfer of the records. Under the revised regulation, this requirement is met if the agency or institution includes a notice in its policies and procedures developed under Section 99.5 that it forwards education records to a school, on request, in which the student seeks or intends to enroll. The requirement would also be met if a letter is sent to the last known address of the parent or eligible student. An educational agency or institution may transfer the records without waiting to receive an acknowledgement from the parent or eligible student that he or she has received the notification. The sending school is not required to further notify a parent or eligible student in those cases in which the transfer of the records is initiated by the parent or eligible student at the sending school.

20. Section 99.35 *Disclosure to certain Federal and State officials for Federal program purposes.*

Comment. A commenter asked for clarification regarding whether Federal officials, other than those Federal officials listed in Section 438(b)(3), could obtain information from the education records of a student without the written consent of a parent of a student or an eligible student.

Response. Section 438(b)(3) enumerates the purposes for which certain Federal and State officials who may obtain information from the education records of a student without the written consent of the parent of a student or an eligible student under Section 438 of the Act and this part. It does not represent an attempt at an exhaustive listing of all the specific authorized representatives of those officials who might have responsibility for performing the functions described in 438(b)(3).

Other changes. Section 99.37 *Release to Federal and State officials* of the proposed rules has been renumbered and retitled Section 99.35 *Disclosure to certain Federal and State officials for Federal program purposes.*

21. Section 99.36 *Conditions for disclosure in health and safety emergencies.*

Comment. Two commenters recommended that the regulations specify that the written consent of a parent of a student or an eligible student is not required for the disclosure of information from the education records of a student in a health or safety emergency.

Response. Section 99.31(a)(10) states that an educational agency or institution may disclose information from the education records of a student without the written consent of a parent of a student or an eligible student in a health or safety emergency, subject to the conditions set forth in section 99.36.

Comment. A commenter stated that the decision as to what constitutes a health or safety emergency should be left to the discretion of an official of an educational agency or institution.

Response. Section 99.36(a) states that an educational agency or institution may disclose information from the education records of a student in a health or safety emergency, but does not specify what constitutes a health or safety emergency. Each educational agency or institution must decide if there is a health or safety emergency which requires the disclosure of information from the education records of a student without the written consent of a parent of a student or an eligible student. Section 99.36(b) enumerates the criteria to be used by an educational agency or institution in making a decision as to whether or not to disclose the information without written consent.

Other Changes. Section 99.35 *Release of information for health or safety emergencies* of the proposed rules has been renumbered and retitled section 99.36 *Conditions for disclosure in health and safety emergencies.*

22. Section 99.37 *Conditions for disclosure of directory information.*

Comment. Three commenters requested clarification regarding what would satisfy the requirement that an educational agency or institution give public notice of the categories of information that it has designated as directory information. The commenter suggested that the regulations specify that in the case of an institution of postsecondary education a notice in the school catalog would satisfy the requirement.

Response. New section 99.37(b) states that an educational agency or institution shall "give public notice." The actual means to be used is to be determined by each educational agency or institution. An institution of postsecondary education could, for instance, publish the required notice and/or an article explaining it in the student newspaper, and make copies of the notice available at various department and school administrative offices.

Comment. A commenter suggested that each educational agency or institution be required to provide notification on an annual basis to parents of students or eligible students sixty days before the beginning of the school year as to the categories of personally identifiable information which the educational agency or institution has designated as directory information. If a parent of a student or an eligible student wanted to prohibit the disclosure of any category of information, he or she would be required to inform the educational agency or institution before or by the start of the school year.

Response. It was felt that it would be extremely difficult for an educational agency or institution to provide notification to parents of students or eligible students 60 days before the start of the school year. Many educational agencies and institutions, particularly institutions of elementary and secondary education, employ a limited number of individuals during the school vacation months. In addition, many educational agencies and institutions do not have an accurate list of students who will be in attendance at the agency or institution until the opening day of school or classes.

Comment. Several commenters indicated they felt that there should be restrictions on the disclosure of directory information by an educational agency or institution.

Response. An educational agency or institution which has followed the procedures set forth under section 99.37 may disclose directory information to any member of the public. Nothing in section 438 of the Act or this part would preclude an educational agency or institution adopting a more restrictive policy regarding the disclosure of directory information.

SUBPART E—ENFORCEMENT

23. *Assurances required—general.*

Comment. Two commenters suggested that each educational agency or institution be required to submit copies of the policies and procedures it has adopted in order to comply with section 438 of the Act and this part either in place of or in addition to the required assurance.

Response. Submission of copies of policies and procedures adopted by educational agencies or institutions is not considered to be an effective means of monitoring compliance with section 438 of the Act and this part, since it is an institution's practice which is of primary importance. However, the policies and procedures formulated and adopted by an educational agency or institution will be subject to review by the office established under section 99.60 as a part of its investigative function.

Comment. A commenter recommended that the requirement that each educational agency or institution submit an assurance that it is in compliance and will continue to comply with section 438 of the Act and this part be deleted because it has no statutory basis.

Response. The requirement that each educational agency or institution submit an assurance that it is in compliance has been deleted, primarily, to avoid additional paperwork burdens on the educational community. The assurance requirement for subgrants and subcontracts has, likewise, been deleted.

24. *Assurances—conflict with State or local law.*

Comment. Several commenters indicated they felt that the procedures for a waiver of the requirements of section 438 of the Act and this part set forth in sections 99.63(b) and (c) of the proposed rules were either unnecessary or inappropriate.

Response. Sections 99.63(b) and (c) of the proposed rules have been deleted. The section has been modified to provide that each educational agency or institution shall inform the office designated to administer the Act if a State or local law exists which conflicts with the requirements of section 438 of the Act and this part.

25. Section 99.62 *Reports and records.*

Comment. A commenter recommended that section 99.64 be revised to specify the types of records and reports which are to be maintained by each educational agency or institution.

Response. The intent of section 99.62 (proposed section 99.64) is to ensure that each educational agency or institution will provide records or reports which may be required by the office or review board to carry out their assigned functions. The nature of such reports and records must be determined on a case-by-case basis. No change has been made in the regulations.

26. Section 99.63 *Complaint procedures.*

Comment. Several commenters recommended that section 99.65(b) of the proposed rules which established a 180-day limitation for the filing of complaints be deleted because it was inappropriate.

Response. Section 99.65(b) has been deleted.

Comment. A commenter suggested that the complaint procedures specify the information which is to be contained in a complaint.

Response. It was felt that most complaints will contain the minimal information which is necessary to begin an investigation of a complaint of an alleged violation of section 438 of the Act or this part. It is the responsibility of the office, as a part of its investigative function, to obtain additional information from the concerned complainant and educational agency or institution. No change has been made in the regulations.

Effective date. These regulations shall be effective on June 17, 1976.

Dated: June 8, 1976.

DAVID MATHEWS,
Secretary of Health,
Education, and Welfare.

Subpart A—General

Sec.
99.1 Applicability of part.
99.2 Purpose.
99.3 Definitions.
99.4 Student rights.
99.5 Formulation of institutional policy and procedures.
99.6 Annual notification of rights.
99.7 Limitation on waivers.
99.8 Fees.

Subpart B—Inspection and Review of Education Records

99.11 Right to inspect and review education records.
99.12 Limitations on right to inspect and review education records at the postsecondary level.
99.13 Limitation on destruction of education records.

Subpart C—Amendment of Education Records

99.20 Request to amend education records.
99.21 Right to a hearing.
99.22 Conduct of the hearing.

Subpart D—Disclosure of Personally Identifiable Information From Education Records

99.30 Prior consent for disclosure required.
99.31 Prior consent for disclosure not required.
99.32 Record of disclosures required to be maintained.
99.33 Limitations on redisclosure.
99.34 Conditions for disclosure to officials of other schools or school systems.
99.35 Disclosure to certain Federal and State officials.
99.36 Conditions for disclosure in health or safety emergencies.
99.37 Conditions for disclosure of directory information.

Subpart E—Enforcement

99.60 Office and review board.
99.61 Conflict with State or local law.
99.62 Reports and records.
99.63 Complaint procedure.
99.64 Termination of funding.
99.65 Hearing procedures.
99.66 Hearing before Panel or a Hearing Officer.
99.67 Initial decision; final decision.

AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g) unless otherwise noted.

Subpart A—General

§ 99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]

(20 U.S.C. 1230, 1232g)

(b) This part does not apply to an educational agency or institution solely because students attending that nonmonetary agency or institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the agency or institution itself.

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(20 U.S.C. 1232g)

(d) Except as otherwise specifically provided, this part applies to education records of students who are or have been in attendance at the educational agency or institution which maintains the records.

(20 U.S.C. 1232g)

§ 99.2 Purpose.

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(20 U.S.C. 1232g)

§ 99.3 Definitions.

As used in this Part:

"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247, as amended.

"Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program.

"Commissioner" means the U.S. Commissioner of Education.

(20 U.S.C. 1232g)

"Directory information" includes the following information relating to a student: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

(20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

(20 U.S.C. 1232g(b)(1))

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in § 99.1(a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution.

(20 U.S.C. 1232g(a)(3))

"Education records" (a) means those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:

(i) Are in the sole possession of the maker thereof, and

(ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a "substitute" means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position.

(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition;

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided,* That education records maintained by the educational agency or institution are not disclosed to the personnel of the law enforcement unit.

(3)(i) Records relating to an individual who is employed by an educational agency or institution which:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee, and

(C) Are not available for use for any other purpose.

(ii) This paragraph does not apply to records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.

(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment; *Provided*, That the records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities which are part of the program of instruction at the educational agency or institution.

(5) Records of an educational agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution. An example would be information collected by an educational agency or institution pertaining to the accomplishments of its alumni.

(20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of postsecondary education.

(20 U.S.C. 1232g(d))

"Financial Aid", as used in § 99.31(a)(4), means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution.

(20 U.S.C. 1232g(b)(1)(D))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law.

(20 U.S.C. 1232g(d))

"Panel" means the body which will adjudicate cases under procedures set forth in §§ 99.65–99.67.

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

"Party" means an individual, agency, institution or organization.

(20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

(20 U.S.C. 1232g)

"Record" means any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche.

(20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health, Education, and Welfare.

(20 U.S.C. 1232g)

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.

(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

(20 U.S.C. 1232g(a)(6))

§ 99.4 Student rights.

(a) For the purposes of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

(b) The status of an eligible student as a dependent of his or her parents for the purposes of § 99.31(a)(8) does not otherwise affect the rights accorded to and the consent required of the eligible student by paragraph (a) of this section.

(20 U.S.C. 1232g(d))

(c) Section 438 of the Act and the regulations in this part shall not be construed to preclude educational agencies or institutions from according to students rights in addition to those accorded to parents of students.

§ 99.5 Formulation of institutional policy and procedures.

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of—

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the student;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of education records maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent of the student or the eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least: (i) A statement of whether the educational agency or institution will disclose personally identifiable information from the education records of a student under § 99.31(a)(1) and, if so, a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest", and (ii) a specification of the personally identifiable information to be designated as directory information under § 99.37;

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

(5) Providing a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of a student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

(20 U.S.C. 1232g(e) and (f))

§ 99.6 Annual notification of rights.

(a) Each educational agency or institution shall give parents of students in attendance or eligible students in attendance at the agency or institution annual notice by such means as are reasonably likely to inform them of the following:

(1) Their rights under section 438 of the Act, the regulations in this part, and the policy adopted under § 99.5; the notice shall also inform parents of students or eligible students of the locations where copies of the policy may be obtained; and

(2) The right to file complaints under § 99.63 concerning alleged failures by the educational agency or institution to comply with the requirements of section 438 of the Act and this part.

(b) Agencies and institutions of elementary and secondary education shall provide for the need to effectively notify parents of students identified as having a primary or home language other than English.

[20 U.S.C. 1232g(e)]

§ 99.7 Limitations on waivers.

(a) Subject to the limitations in this section and § 99.12, a parent of a student or a student may waive any of his or her rights under section 438 of the Act or this part. A waiver shall not be valid unless in writing and signed by the parent or student, as appropriate.

(b) An educational agency or institution may not require that a parent of a student or student waive his or her rights under section 438 of the Act or this part. This paragraph does not preclude an educational agency or institution from requesting such a waiver.

(c) An individual who is an applicant for admission to an institution of postsecondary education or is a student in attendance at an institution of postsecondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation described in § 99.12(a)(3) except that the waiver may apply to confidential letters and statements only if: (1) The applicant or student is, upon request, notified of the names of all individuals providing the letters or statements; (2) the letters or statements are used only for the purpose for which they were originally intended, and (3) such waiver is not required by the agency or institution as a condition of admission to or receipt of any other service or benefit from the agency or institution.

(d) All waivers under paragraph (c) of this section must be executed by the individual, regardless of age, rather than by the parent of the individual.

(e) A waiver under this section may be made with respect to specified classes of: (1) Education records, and (2) persons or institutions.

(f)(1) A waiver under this section may be revoked with respect to any actions occurring after the revocation.

(2) A revocation under this paragraph must be in writing.

(3) If a parent of a student executes a waiver under this section, that waiver may be revoked by the student at any time after he or she becomes an eligible student.

[20 U.S.C. 1232g(a)(1) (B) and (C)]

§ 99.8 Fees.

(a) An educational agency or institution may charge a fee for copies of education records which are made for the parents of students, students, and eligible students under section 438 of the Act and this part; *Provided*, That the fee does not effectively prevent the parents and students from exercising their right to inspect and review those records.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

[20 U.S.C. 1232g(a)(1)]

Subpart B—Inspection and Review of Education Records

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the educational agency or institution to reasonable requests for explanations and interpretations of the records; and

(2) The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

(c) An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

(a) An institution of postsecondary education is not required by section 438 of the Act or this part to permit a student to inspect and review the following records:

(1) Financial records and statements of their parents or any information contained therein;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of a student prior to January 1, 1975; *Provided*, That:

(i) The letters and statements were solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality, and

(ii) The letters and statements are used only for the purposes for which they were specifically intended;

(3) Confidential letters of recommendation and confidential statements of recommendation which were placed in the education records of the student after January 1, 1975:

(i) Respecting admission to an educational institution;

(ii) Respecting an application for employment, or

(iii) Respecting the receipt of an honor or honorary recognition; *Provided*, That the student has waived his or her right to inspect and review those letters and statements of recommendation under § 99.7(c).

(20 U.S.C. 1232g(a)(1)(B))

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to that student.

(20 U.S.C. 1232g(a)(1)(A))

§ 99.13 Limitation on destruction of education records.

An educational agency or institution is not precluded by section 438 of the Act or this part from destroying education records, subject to the following exceptions:

(a) The agency or institution may not destroy any education records if there is an outstanding request to inspect and review them under § 99.11;

(b) Explanations placed in the education record under § 99.21 shall be maintained as provided in § 99.21(d), and

(c) The record of access required under § 99.32 shall be maintained for as long as the education record to which it pertains is maintained.

(20 U.S.C. 1232g(f))

Subpart C—Amendment of Education Records

§ 99.20 Request to amend education records.

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency or institution which maintains the records amend them.

(b) The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

[20 U.S.C. 1232g(a)(2)]

§ 99.21 Right to a hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students. The hearing shall be conducted in accordance with § 99.22.

(b) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall amend the education records of the student accordingly and so inform the parent of the student or the eligible student in writing.

(c) If, as a result of the hearing, the educational agency or institution decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall inform the parent or eligible student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution.

(d) Any explanation placed in the education records of the student under paragraph (c) of this section shall:

(1) Be maintained by the educational agency or institution as part of the education records of the student as long as the record or contested portion thereof is maintained by the agency or institution, and

(2) If the education records of the student or the contested portion thereof is disclosed by the educational agency or institution to any party, the explanation shall also be disclosed to that party.

[20 U.S.C. 1232g(a)(2)]

§ 99.22 Conduct of the hearing.

The hearing required to be held by § 99.21(a) shall be conducted according to procedures which shall include at least the following elements:

(a) The hearing shall be held within a reasonable period of time after the educational agency or institution has received the request, and the parent of the student or the eligible student shall be given notice of the date, place and time reasonably in advance of the hearing;

(b) The hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing;

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.31, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney;

(d) The educational agency or institution shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(e) The decision of the agency or institution shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

[20 U.S.C. 1232g(a)(2)]

Subpart D—Disclosure of Personally Identifiable Information From Education Records

§ 99.30 Prior consent for disclosure required.

(a)(1) An educational agency or institution shall obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in § 99.31.

(2) Consent is not required under this section where the disclosure is to (i) the parent of a student who is not an eligible student, or (ii) the student himself or herself.

(b) Whenever written consent is required, an educational agency or institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or purposes of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

(d) When a disclosure is made pursuant to paragraph (a) of this section, the educational agency or institution shall, upon request, provide a copy of the record which is disclosed to the parent of the student or the eligible student, and to the student who is not an eligible student if so requested by the student's parents.

[20 U.S.C. 1232g(b)(1) and (b)(2)(A)]

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in § 99.34;

(3) Subject to the conditions set forth in § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received; *Provided*, That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number or type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided*, That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in § 99.36.

[illegible]) This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section.

[20 U.S.C. 1232g(b)(1)]

§ 99.32 Record of disclosures required to be maintained.

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interests these parties had in requesting or obtaining the information.

(b) Paragraph (a) of this section does not apply to disclosures to a parent of a student or an eligible student, disclosures pursuant to the written consent of a parent of a student or an eligible student when the consent is specific with respect to the party or parties to whom the disclosure is to be made, disclosures to school officials under § 99.31(a)(1), or to disclosures of directory information under § 99.37.

(c) The record of disclosures may be inspected:

(1) By the parent of the student or the eligible student,

(2) By the school official and his or her assistants who are responsible for the custody of the records, and

(3) For the purpose of auditing the recordkeeping procedures of the educational agency or institution by the parties authorized in, and under the conditions set forth in § 99.31(a)(1) and (3).

[20 U.S.C. 1232g(b)(4)(A)]

§ 99.33 Limitation on redisclosure.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student, except that the personally identifiable information which is disclosed to an institution, agency or organization may be used by its officers, employees and agents, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not preclude an agency or institution from disclosing personally identifiable information under § 99.31 with the understanding that the information will be redisclosed to other parties under that section; *Provided*, That the recordkeeping requirements of § 99.32 are met with respect to each of those parties.

(c) An educational agency or institution shall, except for the disclosure of directory information under § 99.37, inform the party to whom a disclosure is made of the requirement set forth in paragraph (a) of this section.

[20 U.S.C. 1232g(b)(4)(B)]

§ 99.34 Conditions for disclosure to officials of other schools and school systems.

(a) An educational agency or institution transferring the education records of a student pursuant to § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent of the student or the eligible student of the transfer of the records at the last known address of the parent or eligible student, except:

(i) When the transfer of the records is initiated by the parent or eligible student at the sending agency or institution, or

(ii) When the agency or institution includes a notice in its policies and procedures formulated under § 99.5 that it forwards education records on request to a school in which a student seeks or intends to enroll; the agency or institution does not have to provide any further notice of the transfer;

(2) Provide the parent of the student or the eligible student, upon request, with a copy of the education records which have been transferred; and

(3) Provide the parent of the student or the eligible student, upon request, with an opportunity for a hearing under Subpart C of this part.

(b) If a student is enrolled in more than one school, or receives services from more than one school, the schools may disclose information from the education records of the student to each other without obtaining the written consent of the parent of the student or the eligible student; *Provided*, That the disclosure meets the requirements of paragraph (a) of this section.

[20 U.S.C. 1232g(b)(1)(B)]

§ 99.35 Disclosure to certain Federal and State officials for Federal program purposes.

(a) Nothing in section 438 of the Act or this part shall preclude authorized representatives of officials listed in § 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

(b) Except when the consent of the parent of a student or an eligible student has been obtained under § 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in § 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements.

[20 U.S.C. 1232g(b)(3)]

§ 99.36 Conditions for disclosure in health and safety emergencies.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) The factors to be taken into account in determining whether personally identifiable information from the education records of a student may be disclosed under this section shall include the following:

(1) The seriousness of the threat to the health or safety of the student or other individuals;

(2) The need for the information to meet the emergency;

(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section shall be strictly construed.

[20 U.S.C. 1232g(b)(1)(I)]

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

[20 U.S.C. 1232g(a)(5)(A) and (B)]

Subpart E—Enforcement

§ 99.60 Office and review board.

(a) The Secretary is required to establish or designate an office and a review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and the regulations in this part. The review board will adjudicate cases referred to it by the office under the procedures set forth in §§ 99.65–99.67.

(b) The following is the address of the office which has been designated under paragraph (a) of this section: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health, Education, and Welfare, 330 Independence Ave. SW., Washington, D.C. 20201.

(20 U.S.C. 1232g(g))

§ 99.61 Conflict with State or local law.

An educational agency or institution which determines that it cannot comply with the requirements of section 438 of the Act or of this part because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part shall so advise the office designated under § 99.60(b) within 45 days of any such determination, giving the text and legal citation of the conflicting law.

(20 U.S.C. 1232g(f))

§ 99.62 Reports and records.

Each educational agency or institution shall (a) submit reports in the form and containing such information as the Office of the Review Board may require to carry out their functions under this part, and (b) keep the records and afford access thereto as the Office or the Review Board may find necessary to assure the correctness of those reports and compliance with the provisions of sections 438 of the Act and this part.

(20 U.S.C. 1232g(f) and (g))

§ 99.63 Complaint procedure.

(a) Complaints regarding violations of rights accorded parents and eligible students by section 438 of the Act or the regulations in this part shall be submitted to the Office in writing.

(b) (1) The Office will notify each complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the agency or institution under paragraph (b)(1) of this section shall include the substance of the alleged violation and the agency or institution shall be given an opportunity to submit a written response.

(c) (1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation the Office will provide written notification of its findings and the basis for such findings, to the complainant and the agency or institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (c)(2) of this section, the specific steps which must be taken by the agency or educational institution to bring the agency or institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the agency or institution to voluntarily comply.

(d) If the educational agency or institution does not come into compliance within the period of time set under paragraph (c)(3) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.64–99.67, inclusive.

(20 U.S.C. 1232g(f))

§ 99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational agency or institution has failed to comply with the provisions of section 438 of the Act, or the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1(a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected by the failure to comply) until there is no longer any such failure to comply.

(20 U.S.C. 1232g(f))

§ 99.65 Hearing procedures.

(a) *Panels.* The Chairman of the Review Board shall designate Hearing Panels to conduct one or more hearings under § 99.64. Each Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) *Procedural rules.* (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1)(ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(20 U.S.C. 1232g(g))

§ 99.66 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.65(b)(2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 1232g(g))

§ 99.67 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording the party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review the decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany that action with a written statement of the grounds for the modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon the decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational agency or institution involved or its attorney.

(20 U.S.C. 1232g(g))

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APPENDIX 3

From "Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission"

Chapter 10

Record Keeping in the Education Relationship

An individual's relationships with educational institutions help shape his personal development and may substantially affect the degree to which he can enter into and benefit from all other social and economic activities and relationships. The records about individuals that the education relationship generates affect almost everyone, for nearly every American has or will have spent some time in at least one educational institution.[1]

Within an educational institution, education records[2] form a background against which decisions about an individual student's status or progress are made, not only at the major turning points in his educational career, but also on a daily basis where they shape unobtrusive but significant decisions about him. Educational record-keeping practices, however, vary substantially by size of institution and sophistication of administrative practices. They also vary as students move along the continuum from preschool toward post-graduate education, because the role of educational institutions varies along the same continuum.

Society grants educational institutions substantial authority over students and substantial freedom to gather, record, and use information about them without their consent or the consent of their parents. This is considered necessary if educational institutions are to provide basic instructional services and maintain an environment conducive to learning and personal development. Nonetheless, the authority to act in *loco parentis* carries with it the responsibilities of stewardship. Report cards, conferences, and parent-teacher associations are all devices by which educational institutions are held directly accountable to parents and students. In addition, through the election of school officials, as well as through licensing, accrediting, and the enactment of State education codes, educational institutions are held accountable to the society as a whole.

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[1] "Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law. The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of those components separate from that agency or institution. 20 U.S.C. 1232g(a)(8).

[2] "Education records" are those records which: (1) are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. 1232g(a)(4).

The accelerated pace of social change in recent decades has subjected the stewardship role of educational institutions to unprecedented stress. The population explosion of the past thirty years, the growing mobility of the American population, and the rapid increases in the breadth and specialization of knowledge have all had a direct impact on educational institutions. Parents, students, and society as a whole have developed new expectations as to the skills educational institutions should impart. Courses now cover subjects ranging from woodworking and driver education to regression analysis and zero-based budgeting. With this growth in size and scope of responsibility, have come bureaucratic forms of administration, larger budgets, mounting pressures to demonstrate effectiveness, and a heightened drive for autonomy and special prerogatives on the part of professional educators.

Over the last fifteen years, the Federal government has affected all levels of education through financial assistance programs aimed at helping educational institutions to meet their responsibilities, and also at using educational institutions to further other social purposes, such as equal opportunity. This has reinforced the educational system's own gravitation toward bureaucratic administration and professional specialization. It has also altered record-keeping requirements and practices, modified power balances within educational institutions, and made many educators wary of Federal regulation.

The combined impact of all these changes on record keeping about students has been the focus of Commission concern. Educational institutions make and keep more records about students today than ever before. More people participate in making and keeping education records, and more people outside the educational system want access to them for other than educational purposes. Moreover, the emphasis in educational record keeping has shifted from reporting progress to parents and supplementing personal contact in instructing and making decisions about students to serving not only as a management tool but also as a means of justifying an educational institution's actions and budget, and as a surrogate for personal contact with students. These changes have elevated the importance of education records in American society, and thus the importance of good school record-keeping practices.

The importance of educational record keeping today was formally recognized in 1974, when the Congress enacted the Family Educational Rights and Privacy Act (hereinafter FERPA). *[20 U.S.C. 1232g]* This legislation gives parents of minor students, and students who are over 18, the right to inspect, correct, amend, and control the disclosure of information in education records. It obliges educational institutions to inform parents and students of their rights, and to establish policies and procedures through which their rights can be exercised.

FERPA represents an alternative to the omnibus approach to regulating record keeping taken by the Privacy Act of 1974. The Privacy Act, applicable to all Federal agencies, levies a broad set of requirements on a diverse mix of records and record-keeping institutions. FERPA, in contrast, is targeted on education records, the individuals to whom they pertain, and the institutions that keep them.

FERPA, the Department of Health, Education, and Welfare (DHEW) regulations implementing it *[45 C.F.R. 99]*, and the activities of the Department in carrying out its responsibilities under the law, exemplify, albeit imperfectly, a novel regulatory strategy that might be termed "enforced self-regulation." The regulated institutions are responsible for developing and implementing policies and procedures that meet minimum requirements established by law. Those legal requirements state objectives for the development and implementation of local substantive and procedural requirements, but do not prescribe detailed substantive standards or impose fine-grained procedures. Such a strategy entails penalties for violations of locally established standards and procedures, but does not impose any particular interpretation of substantive standards. Rather, it relies on making an institution accountable to those whom it most directly affects without requiring either prior Federal approval of local policies and procedures or systematic Federal monitoring of each institution's performance.

To evaluate the merits of FERPA as a privacy protection statute, the Commission held public hearings in October and November 1976 to learn about the experiences of parents, students, professional educators, and educational institutions in complying with the law. At the time of the hearings, the Department of Health, Education, and Welfare's final FERPA regulations had been in effect less than nine months, although the statute had been in force for almost two years. Many institutions were still developing, or had only recently begun to implement, their FERPA policies and procedures.

In the Commission's view, however, the hearing testimony confirms the necessity and validity of most FERPA requirements and the potential effectiveness of "enforced self-regulation." The hearing record also indicates that some features of the statute and regulations make implementation difficult or dilute its effectiveness. Nonetheless, FERPA is apparently leading educational institutions to respect some basic record-keeping rights that were not uniformly accorded students or parents before the Act was passed.

Educators, parents, and students have generally accepted FERPA's principles despite some minor problems and misunderstandings, and the extreme sensitivity of educational institutions to Federal regulation. In spite of the substantial delay in issuing regulations and the resulting lack of awareness and even misunderstanding of the law, the testimony of educational institutions indicates that enforced self-regulation can take hold, and, if strengthened, can be an effective tool for striking the proper balance among individual, institutional, and societal interests.[3]

This chapter reports the results of the Commission's assessment of the Family Educational Rights and Privacy Act of 1974 and recommends some changes in the Act that will make it better able to achieve the Commission's public-policy goals of minimizing intrusiveness, maximizing fairness, and creating legitimate, enforceable expectations of confidentiality. The first section focuses on the role of record keeping about students. It summarizes the missions and functions of the various types of educational institutions and describes the records they keep and how they collect, use, and disclose information about individual students. This section also describes the testing and data-assembly service organizations whose highly specialized education records play a major role in post-secondary admissions and financial-aid decisions.

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[3] See, for example, written statement of Franklin and Marshall College, *Education Records*, Hearings before the Privacy Protection Study Commission, November 11, 1976, pp. 7-15; (hereinafter cited as "Education Records Hearings").

The second section describes the Family Educational Rights and Privacy Act, its accompanying DHEW regulations, and the experience to date in implementing the law. The third section assesses how well personal privacy is protected by FERPA, and presents the Commission's basic conclusions. The focus in the third section is on specific record-keeping problems that arise in the various types of educational institutions and the tools the individual currently has for coping with them. The final section recommends additional steps to clarify and strengthen FERPA as an instrument for achieving the basic objectives of the Commission as they relate to educational record keeping.

RECORD-KEEPING PRACTICES IN EDUCATION

Some 60 million students are currently enrolled in formal educational programs provided by educational institutions. As a student moves from one point to another in the education system, his path is blazed by records concerning his performance, his behavior, and his own, and often his family's, life circumstances. These records are created by an educational institution mainly to record the student's progress, to help make decisions about him, and to improve the effectiveness of the educational programs the institution provides.

Education records are generated in many different organizational settings from pre-school through post-graduate institutions. For most individuals, the educational experience is a progression through a number of organizations with differing missions, roles, functions, and authorities with respect to both the individual and society. It is important to recognize that the record-keeping practices of educational institutions reflect those differences.

The mission and role of an educational institution are key determinants of its record-keeping practices. The mission of a pre-school is to care for and nurture children and to lay a foundation for the academic tasks they will confront in elementary school. The elementary school's mission is nurturant and custodial, but also includes formal instruction in reading, mathematics, and other subjects. As the child moves through the elementary years, the school's custodial role is augmented by a greater concern for socialization. Gradually, the school's nurturant role is overshadowed by its role in developing fundamental academic skills until the junior high-school years, when the nurturant role disappears altogether. The custodial role remains as long as compulsory education laws force children to attend school, but the school's emphasis shifts towards maintaining the order necessary to carry out its academic mission.

The post-secondary educational mission is almost exclusively one of intellectual development and training; it includes only vestiges of custodial care and behavioral control. In most post-graduate and professional schools a concern with socialization reappears, but is much more narrowly focused on inculcating professional mores and ethics. Thus, while the instructional mission runs as a common thread throughout all schooling, there are, in fact as well as in law, two quite distinct educational systems in this country: elementary and secondary education on the one hand, and post-secondary education on the other.

ELEMENTARY AND SECONDARY EDUCATIONAL INSTITUTIONS

The ways in which record keeping about students in elementary and secondary education differs from record keeping about students in higher education can be understood by examining six features of the record-keeping relationship in the two systems: (1) the role of records in decision making; (2) institutional decision-making responsibilities and authorities; (3) variations in organizational settings; (4) the ways in which records are created and used; (5) record-keeping responsibilities and authorities; and (6) disclosure practices.

THE ROLE OF RECORDS IN DECISION MAKING

Elementary and secondary educational institutions share responsibility for the intellectual, social, and ethical development of a student with the student's parents and with others who deal with youth, such as child welfare and juvenile justice agencies. In pursuing this broad mission of child development, schools provide instructional services, regulate behavior, report to parents on academic performance and social conduct, diagnose student needs, and conduct special programs for students. The visible decisions they make concern matters such as class placement and promotion, eligibility for special educational programs (such as for handicapped or gifted children), eligibility for public assistance and social services programs (school breakfast and lunch programs, for example), and major disciplinary decisions, such as suspension or expulsion. Much less visible are the series of small decisions they make which subtly shape a student's educational career: decisions about the speed with which a child's development should be fostered in specific areas of academic course work or personal conduct, for example, or about the sanctions and rewards that should be used to discipline or encourage a child.

The main characteristic of decision making about students in elementary and secondary education is that it is contextual. Regardless of the philosophy of education a school espouses, elementary and secondary school professionals generally believe that decisions must be made on the basis of the "whole child"; that is, that intellectual and social development

120

are intimately related. This encourages schools to assemble so much information about students that it becomes difficult to determine which information is or was the basis for a particular decision. Both in routine decision making, such as when class placement or promotion is at issue, and in decision making based on fairly specific criteria, such as when public assistance or social services eligibility must be decided or suspension or expulsion proceedings concluded, the practice is to look at such a multiplicity of factors that the relationship between specific items of information and the ultimate decision becomes increasingly unclear.

INSTITUTIONAL DECISION-MAKING RESPONSIBILITIES AND AUTHORITIES

Public schools are given broad authority to make decisions about students. Public elementary and secondary institutions must deal with all children. Admission is not selective, nor can public schools set performance standards that would eliminate certain students from the student body or narrow the variety of programs that will be offered. Thus, while they strive to cooperate with parents, the degree to which public schools share authority with parents has been largely left to schools to decide.

Most public educational institutions are special-purpose local governments created by State law, accountable to the people of the school district through locally elected and appointed school boards and school officials. State education laws place limits on the authority of schools, and prescribe due process procedures that order decision making and reinforce parental control. Nevertheless, a State code cannot regulate all placement and treatment decisions, and many such decisions are not visible enough to parents to induce their involvement. Parents of private and parochial school students have the option of withdrawing their children from the school if they dislike the manner in which the school exercises its authority, but beyond that, parents have little ability to control decisions made by elementary and secondary schools about their children, even in the private-school setting.

VARIATIONS IN ORGANIZATIONAL SETTING

Elementary and secondary education occurs in a diversity of organizational settings. Despite a strong trend toward consolidation, there are still more than 15,000 school districts in this country. Within and among districts there is also great variation in size, organizational complexity, types of special services offered, and intensity of involvement in economic and social issues, such as racial balance, drug use, juvenile crime, and cultural disadvantage. The Los Angeles Unified School District, for example, serves over 600,000 students. It has more employees providing administrative and special educational services than classroom teachers, different organizational structures for its instructional services than for its special ones, and its own police force to cope with juvenile crime problems. It also receives massive Federal funding.[4] In contrast, some small consolidated rural school districts serve fewer than 10,000 students, maintain a high teacher-to-suppport staff ratio, offer only a few special services, have few delinquency problems, and receive minimum Federal support.

Despite these differences in organizational setting, however, all schools today have some common characteristics that affect the way they collect, maintain, use, and disclose information about students.

- Schools are tending to rely more on records than on personal contact in arriving at decisions.
- As maintaining order and sharing decision making with parents become more difficult, school officials feel a greater need for autonomy and for confidentiality in communicating with other school officials.
- Policy-making functions have been increasingly centralized as a consequence of growth and consolidation of school districts, but administrative decisions and policy implementation remain decentralized and generally free of monitoring by a central authority.
- Children are assigned and treated according to special categories established on the basis of various characteristics and performance indicators.
- Educational personnel have become increasingly professionalized, and thus more attentive to the standards of their particular professional specialties than to those of the institution that employs them.
- Any school or school district is a microcosm of the community in which it exists and hence, to the degree that juvenile crime, racial conflict, drug and child abuse, and other social problems exist in communities, schools have to deal with them both alone and in cooperation with other community institutions.
- Because most school districts are overcommitted, driven by contradictory demands to deliver more services and cope with social problems while reducing costs or holding them constant, record-keeping problems cannot successfully compete with other demands for their time, attention, and resources.

CREATION AND USE OF RECORDS

The content of school records is to some extent required by State education laws and local school boards. Information such as the child's name and birthdate, immunizations, and a certain amount of descriptive information about family background at the time of enrollment are usually required. Thereafter, grades and credits are added to a student's record, along with health information, test scores, actions authorized by the school, parental authorizations or prohibitions, and family financial data. In addition, a student record now almost always includes information about the behavior and personality of the student, his social life; and the status, attitudes, and behavior of his family. For example, one school district's guidelines[5] allow the accumulation of information about

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[4] Testimony of the Los Angeles Unified School District, Education Records Hearings, October 7, 1976, pp. 8-100.

- family life—attitudes of parents toward the school, stability of the home, the social and economic status of the family;
- personal characteristics—aggressiveness, amount of attention demanded, reaction to sexual development; and
- social life—crushes, boy-girl relationships, kinds, numbers, and age of friends, and membership in churches, lodges, or fraternal organizations.

Much of the information about a student is kept at the school in a cumulative record, but some information—such as psychological test data, records of family visits by school social workers, eligibility for special programs—is maintained separately.

Methods of collecting information vary. Much of it is provided to the school directly by the student or his parents, while other information comes from test scores and teacher or administrative evaluations. So-called "anecdotal information" is created by the institution on its own initiative from observation of the student; from analysis, interpretation, and synopsis of information already on record; and from interpretations made by the person creating the record when information provided by the student or parent is insufficient.

Anecdotal information tends to be negative. Elementary and secondary institutions normally have resources available to them for the detection and treatment of special student problems. Thus, the task of detecting problems early and providing special treatment to remedy them creates a diagnostic bias toward negative information. This bias may grow when there are institutional or fiscal incentives to over-identify problems. It also can grow when the methods of diagnosing a problem leave room for interpretation, or when the person making the entry is not professionally qualified to report a diagnosis (e.g., the diagnosis of unruly children as hyperkinetic by people who are not medical professionals).

There are few limits on a school's internal use of education records in making administrative and instructional decisions about students. School authorities do not hesitate to seek and use whatever information about the student's background and personality might seem to bear on his academic performance. Even those special programs to which a child is assigned on the basis of some specific characteristic tend to use a broad base of information in making decisions about him once he is in the program. Individualized instruction, "mainstreaming" (i.e., incorporating educationally handicapped children and programs designed especially for them into the normal classroom situation) and team teaching—all popular innovations in elementary and secondary education today—are likely to intensify rather than diminish this reliance on a large number of factors in evaluating a student.

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[5] Los Angeles City School Districts, Division of Elementary Education, Guidance and Counseling Section, *Cumulative Record Handbook for Elementary Schools: A Guide for Teachers*, Tentative Edition, December 1968.

Standards regarding the content and use of records often exist on paper but are rarely put into practice. The best information management practices are found in academic grading. Grades are systematically created by processes generally known to parents and students and are documented and regularly reported to them. For other types of records, however, there are few generally accepted standards of relevance or propriety. Administrative control of record keeping is minimal. While most institutions define what they consider to be basic information, individual educators generate a wealth of other records. For example, many individualized instruction programs require a diagnostic profile of each child to be used in making day-to-day instructional decisions about him. Without systematic quality control, however, the information in records of this type is bound to reflect the varying competencies of the professionals who create them.

Some elementary and secondary school districts have guidelines specifying the kinds of information members of the school staff may enter in a student's cumulative record. For example, a guideline might specify that entries include only firsthand observations, noting the time and place of the observation and the identity of the observer. To make such guidelines effective, however, the staff must be trained to follow them and student records must be systematically reviewed for compliance.

Given the multiple functions and broad responsibilities of elementary and secondary schools, the differences among them, and the emphasis on the whole child, there is understandable disagreement about what standards for record keeping should be. Even if standards for relevance, propriety, and reliability of information were firmly established, it would be difficult to monitor their application because record keeping in most school systems is so decentralized.

RECORD-KEEPING RESPONSIBILITY AND AUTHORITY

The authority of educational institutions to collect, use, and disclose information about students is even broader than their authority to make administrative and instructional decisions. State laws usually do not restrict the collection of information, nor do they surround the information that forms the basis of educational decisions with due process protections.

Local boards of education seldom involve themselves in developing record-keeping policies, leaving it to professional educators, whose primary concern is school management, to establish such policies. Educators, in turn, have given the matter little attention and have seldom consulted parents and students about what information is collected or how it is used. As records come to substitute for personal interaction, educators understandably come to view records as their own and view the involvement of parents and students in decisions about record keeping as a threat to their autonomy and an implied insult to their integrity.

DISCLOSURE PRACTICES

Most elementary and secondary institutions have a tradition of treating records about students as "within the family," that is, as entrusted to the school for use by the school. The tradition is being challenged by both internal and external pressures. Increased specialization has divided responsibility within the school among teachers, psychologists, social workers, security personnel, and professional school administrators. Each type of school employee tends to have different relations to outside agencies and professionals. Thus, a school social worker, for example, relates as much to a colleague in a child welfare or corrections agency as he does to his school principal. Moreover, he often needs the assistance of professionals in those agencies who turn to him for assistance as well.

Some believe that schools exceed the limits of justifiable sharing of information about students or their families. For example, in school districts troubled by gang violence or drug abuse, school disciplinarians may informally share information about student behavior with local law enforcement agencies. In Maryland, for example, a county government began collecting information about students' families ostensibly to establish the students' eligibility to attend county schools, but the information was routinely shared with motor vehicle and taxing authorities for purposes having little or nothing to do with the educational mission of the school district.[6]

A school district may also transfer individually identifiable information from student records to other State agencies in order to establish the district's eligibility for categorical funds. In addition, school districts also share individually identifiable records with State and Federal agencies or their contractors for audit, program evaluation, research, and statistical purposes. Decisions to use student records for research purposes are usually made at the level of the individual school, whether or not policies regarding such use exist at the district level.

The Commission's findings indicate that practices with respect to research use of student records in elementary and secondary school districts vary widely.[7] In some districts the outside researcher is considered a nuisance. In others, it appears that close relationships exist between school personnel and university-based researchers who share a common interest in the use of student records for research purposes. In most cases, however, research has little or nothing to do with the immediate education of the child whose records are used, nor does it directly benefit the child or the school. While some schools seek parental consent before disclosing records for research purposes, or parental participation if the project entails the collection of new information, practices at the elementary and secondary level seem to present few barriers to the use of student records for research purposes.

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[6] Elizabeth Becker, "Parents say 'School board is prying,'" *Washington Post*, May 6, 1976, Maryland Section, p. 6.

[7] Testimony of Stefan Javanovich of the Urban Policy Research Institute, Education Records Hearings, October 7, 1976, pp. 121-22.

Education records, like hospital records, public assistance and social services records, and other administrative records are becoming a valuable commodity for large-scale studies. Schools are finding it more difficult to resist research demands on their records or to control the conditions of use and redisclosure, especially if the research is sponsored by an agency that supplies them with funds.

PRINCIPAL RECORD-KEEPING PROBLEMS

While any generalizations about a world as large and diverse as elementary and secondary education must have numerous exceptions, the Commission's inquiry led it to the following general conclusions with respect to the records elementary and secondary educational institutions generate about students.

- School record-keeping practices are often anachronistic and institutional interests tend to overshadow the interests of students and parents in the collection, use, and dissemination of education records.
- Given the demand for curriculum reform, improvement of service delivery, and cost reduction, there is little incentive to devote the time, energy, or money to update or substantially modify record-keeping practices.
- The character of educational record-keeping systems (e.g., the range of information they include, its subjectivity, and the lack of criteria for relevance or propriety) create privacy problems for an individual whose ability to protect himself is weak.
- The authority of the institution, the uncertain relationship between decisions and information, and the institution's weak accountability to its students and their parents further diminish the individual's ability to cope.
- As educational records become more important, educational institutions tend to see control over them less as a stewardship on behalf of students than as a prerogative that cannot be shared with students and parents.
- The pressures for more collection and dissemination of information will continue, and there is little to counter them.

POST-SECONDARY EDUCATIONAL INSTITUTIONS

The primary mission of post-secondary institutions is academic and vocational, and focuses on the development of intellectual and technical skills. Because most students in institutions of higher education are adults, the institution shares responsibility for their development not with parents and other social institutions, but with the students themselves. Normally, institutions of higher education do not actively seek to identify students who are potentially eligible for assistance that supplements academic training. The institution may or may not assist a student in obtaining public assistance and social services, for example, but if it does, acceptance of those services by the student is voluntary; the institution does not have custodial responsibility.

The difference in institutional mission and responsibility is the key to understanding the differences between the record-keeping practices of elementary and secondary schools and those of post-secondary schools. In post-secondary education, the minimal institutional responsibility for socialization of the student and the lack of custodial responsibility creates a simpler and more differentiated set of relationships between the institution and the individual.

THE ROLE OF RECORDS IN DECISION MAKING

The limited and narrowly focused mission of post-secondary institutions results in a more limited and clearly defined set of functions and types of decisions. The primary functions are to provide instruction, to order a student's progression through a broad but highly standardized set of instructional programs, and to provide academic counseling. In addition, most post-secondary institutions provide a range of ancillary services such as medical care, financial assistance, and housing.

The majority of post-secondary institutions draw a clear line between instructional and ancillary services. The student's academic relationship with the institution is usually clearly segregated from his financial, medical, or housing relationships. The basic decisions that relate to admission, to evaluation of academic performance, and determination of eligibility for financial aid are characterized by highly rational, comparative decision making based upon well known criteria.

INSTITUTIONAL DECISION-MAKING RESPONSIBILITIES AND AUTHORITY

The relationship between a post-secondary institution and its students is voluntary and contractual in nature. Generally, the rights and responsibilities of both are spelled out in advance. Rules of conduct, and sanctions for violations, are made known to students. Academic requirements, in terms of required courses and performance levels, are clearly defined. Admission is usually selective except in some State systems, so most institutions can use performance standards to control enrollment. Individual institutions can also control the variety of programs they offer.

Post-secondary institutions have much broader authority than do elementary and secondary institutions. Public institutions are established and regulated by State law, but generally are delegated broad authority. Private institutions are subject to some government regulation, but it does not usually affect their authority over students. Nevertheless, post-secondary institutions have in recent years increasingly shared both responsibility and authority with students. The involvement of students in governance at the departmental, college, and even university level is common, especially insofar as program planning, standard setting, and developing due process mechanisms for decision making are concerned. Colleges and universities, particularly those that are public, have permitted, and in some cases encouraged, strong student organizations to negotiate with faculty and administrators on matters of mutual interest.

VARIATIONS IN ORGANIZATIONAL SETTING

There is a strong trend toward large and diversified public higher education systems with huge campuses. Some states like California have a university system in which each campus has a full array of undergraduate, graduate, and professional schools; a state college system in which each campus has a full complement of undergraduate institutions and some graduate and professional schools; and a number of community colleges. Nonetheless, there are still many private institutions, including sectarian or liberal arts colleges, with fewer than 1,000 students.

The size of student bodies in post-secondary schools can vary from a few hundred to 50,000. Some campuses are urban while others are located in communities with a smaller population than the campus. In the latter case, the community may be economically and socially dependent on the school. Some campuses have more than 100 departments offering specialized training and more than 15 quasi-autonomous schools or colleges. Some of the larger campuses have annual budgets of over $300 million and more than 10,000 employees. Most post-secondary schools have some kind of law enforcement unit or special arrangement with local law enforcement units. Some use Federal funds only for Basic Opportunity Grants for Handicapped Students; others receive up to 40 percent of their total budget from Federal agencies.

Again, however, there are certain characteristics common to all of these diverse organizational settings that affect the collection, maintenance, use, and dissemination of records about students.

- The larger the student body, the more likely it has been for an institution to rely on records rather than on personal contact in dealing with students, particularly at the graduate levels.
- In the last decade, post-secondary institutions have increasingly shared authority and responsibility with students.
- While growth has led to centralization of policy and administrative support functions, academic decision making about individual students remains highly decentralized.
- Ancillary services such as health care, psychological services, law enforcement, financial aid, and undergraduate admissions tend to be highly professional and completely separate from the academic decision processes, with independent recordkeeping practices that are governed by the standards of the different professional groups involved.
- Universities and even small colleges, tend to be cities unto themselves; not microcosms of the communities in which they are located. Hence, relationships with community agencies are the exception rather than the rule.
- Colleges and universities, like elementary and secondary

schools, are caught between demands for more services and high fixed costs. Many engage in research and public service functions, both to support their graduate and professional programs and to meet public needs. These activities often strain their budgets and dominate their attention. Almost all are under tremendous pressure from State legislatures, students or alumni to curtail rising costs.

- Many post-secondary institutions are major employers, custodians of massive physical complexes, and major contractors for a variety of Federal agencies. As such, they must comply with Federal program requirements that tend to increase their costs, decrease management control at a time when they are pressed for management efficiency, and dominate much of their agenda. Federal requirements arising from anti-discrimination legislation, Federal procurement practices, occupational safety and environmental protection legislation, student-loan and other financial assistance programs have made post-secondary institutions wary of Federal regulation. Post-secondary institutions have also developed a tendency to concentrate on the letter rather than the spirit of Federal program requirements.

CREATION AND USE OF RECORDS

Post-secondary institutions maintain many different kinds of records about students. Some are centralized; others are created solely for the use of a department, committee, or individual faculty member. Some are conscientiously used for only one purpose; others are segregated in theory but are actually used widely for many purposes. Some are uniform in content, format, and method of collection; others differ widely in those respects. The problem for the individual in a post-secondary institution arises from the difficulty of finding out what records are being kept, by whom they are being kept, and for what purposes they are being used.

The records on students that are centralized are primarily academic records (e.g., courses, credits, grades, letters of recommendation), attendance records, and financial records. Such records seldom include much information about a student's family or social life, and only rarely include anything about a student's personality and behavior.

The centralized record about a student starts with admission. In most of the public undergraduate institutions, admissions is a fairly straightforward and simple process. The applicant supplies most of the information needed, including academic, financial, and health information, and often letters of recommendation to verify and supplement the academic record. Registrars' offices usually maintain the official academic record, which includes information regarding course work, credits earned, and grades. Health and financial records are maintained separately.

In private undergraduate institutions, and in both public and private graduate and professional schools, the admissions process generates a detailed record on the applicant, only part of which is supplied to the school by the applicant himself. Such records may include the results of faculty and staff interviews, letters of recommendation, indicators of expected performance generated from analysis of transcripts, ratings or rankings created by the admissions process, and documentation of the actions taken by admissions officers and committees with respect to the individual applicant. The admissions decisions of these institutions often allow for considerable exercise of professional judgment, unsupported by documentation. Admissions criteria often include vaguely defined attributes such as "character" and "morals."[8] Although some admission decisions are made on the basis of objective information, in many cases highly subjective data on applicants is collected and used. Institutional controls on the relevance, propriety, and reliability of the information collected do not appear to exist.

Letters of recommendation, whether written at the request of the applicant or the institution, play a role in some but not all admissions decisions. While there is great variation in attitudes toward the value of letters of recommendation, the professors preparing them, and the institutions receiving them have tended to treat them as confidential communications that should *not* be made available to the applicant.

Universities usually set minimum record-keeping requirements for colleges and academic departments, but academic record keeping outside the registrar's office is extremely decentralized. Colleges and universities have very few restrictions or even guidelines on content, format, or method of collecting information for records kept at the department or college level. There are, moreover, few incentives for an academic department to cede any professional or departmental control over record keeping to a centralized authority within the institution. This is especially true if control impinges on activities that faculty members perceive as professional prerogatives and which, therefore, crucially affect faculty-administration relationships. Nonetheless, problems such as grade inflation suggest that the professional standards of judgment in academic performance evaluation are inconsistent, relatively weak, and often of no great interest to those making such judgments. Faculty members are not specifically trained to evaluate student performance. While standards are difficult to set, and the evaluation process will always rely heavily on professional judgment, records of evaluators normally do not include the evidence underlying the judgments they contain.

As written records tend to be substituted for the unrecorded personal knowledge of faculty and administrators, "second-order" student records have been increasingly generated. An example of such second-order records are those created by teaching assistants to enable a faculty member to operate in a system which presumes he has personal knowledge of his students, even though his class may include 400 students. Another illustration is the records created by academic supervisory committees to develop and monitor a graduate student's curriculum. Such records may or may not be official, and they often differ within colleges or even within departments of the same institution. Information in these kinds of records is, however, almost always limited to academic performance and performance evaluation. They are not used for diagnosis or specialized treatment because students in post-secondary schools are expected to make decisions about courses without the benefit of someone else's analysis of special needs.

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[8] Testimony of the Medical School, University of California, Los Angeles, Education Records Hearings, October 8, 1976, pp. 556-58.

Ancillary services can be quite elaborate in post-secondary institutions. Many university counseling centers, for example, provide psychotherapy for students, and almost all maintain student health centers staffed by physicians. Many even have hospital facilities for student use. Financial aid services, too, may be quite extensive, and may generate extensive records about students and their parents. These financial records are not commingled with other centralized records, however, and information in them is rarely disclosed or used within the university for other than financial-aid purposes.

Post-secondary institutions usually keep disciplinary records on students, and many institutions have campus security units that maintain their own records. Student records are often shared between administrators responsible for discipline and campus security forces.[9] Such information does not affect academic decision making, although academic records are often used in evaluating students who have created a disciplinary problem. Nevertheless, there are few internal limits on the use of academic or disciplinary records. For example, the turbulent period of the late 1960's and early 1970's provided many examples of the ability of institutions to collect and use information about students in order to control them.[10] The boundaries between academic and disciplinary decision making are sometimes more nebulous than the institutions like to admit, and in times of political stress, professional ethics are a poor substitute for legal controls over the internal uses of records.

RECORD-KEEPING RESPONSIBILITY AND AUTHORITY

Post-secondary institutions have almost unlimited freedom to collect and use records about students. Few proscriptions regarding the collection or use of records appear in law or university policy. The public accountability structures in both public and private institutions, while powerful, are neither sufficiently focused on administrative questions nor responsive enough to students' interests to limit record-keeping autonomy. In practice, professional standards, and the recent trend toward student involvement in university governance, do provide some limits on institutional autonomy. As noted above, however, record keeping in higher education is predominantly a professional prerogative.

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[9] Submission of National Student Association, Education Records Hearings, November 12, 1976.

[10] Testimony of National Student Association, Education Records Hearings, November 12, 1976, pp. 392-93.

DISCLOSURE PRACTICES

In post-secondary education, there is little occasion for information to flow beyond the bounds of the educational institution. Colleges and universities have a tradition of limiting the release of information about students to external organizations, in effect holding the information in "trust" for the students. Traditionally, they have released information regarding attendance, degrees received, courses taken, and honors received, but most will not transfer records of a student's academic performance or financial situation to other institutions unless a student requests that they do so.[11]

Much of the current demand for information in student records comes from commercial interests developing mailing lists, or from Federal agencies conducting research, evaluating programs, or auditing financial records. For example, controversy arose recently over the use of student information by the Veterans Administration (VA) in auditing VA student-aid programs administered by institutions of higher education. The VA auditors compare records of students who do not receive its funds with the records of students who do, and inspect student records without the consent of the students involved.[12] In at least one reported instance, records on students were physically removed from a school to another location where they were inaccessible to students.[13] Still, research using information in records on students in individually identifiable form in higher education is not extensive. In addition, while institutions may permit such use without the consent of the individual under certain circumstances, universities are usually quick to demand guarantees of confidentiality from the researchers.[14]

The most sensitive disclosures made by post-secondary institutions are to law enforcement authorities. In the recent past, a number of universities have collaborated with law enforcement and intelligence agencies to generate and share information on the political activities of student radicals. Many post-secondary institutions depend on local law enforcement agencies for campus security and may share information with these agencies. This sharing occurs most often in institutions that have campus security units. These units, usually staffed by law enforcement professionals, are more likely to follow the professional law enforcement norm of widespread sharing of information with other law enforcement authorities than the norm of strict confidentiality generally followed by educational institutions. The information shared is often trivial—for example, the fine for a parking ticket given by a campus policeman may have to be paid to the local city government at the latter's offices, an arrangement which entails a record transfer of minimal import. In other situations, such as in cases involving drug traffic, major thefts, or threats of violence, the information shared may be much more extensive and consequential.

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[11] See, for example, Testimony of Goucher College, Education Records Hearings, November 11, 1976, pp. 276-77; Testimony of University of Maryland, Education Records Hearings, November 11, 1976, pp. 293-96; and Memoranda of staff interviews with admissions officials of the University of California, San Diego and the University of California, Los Angeles.

[12] See, for example, Testimony of Goucher College, Education Records Hearings, November 11, 1976, pp. 276-77; and Testimony of University of Maryland, Education Records Hearings, November 11, 1976, pp. 282-83.

[13] Memoranda of staff interviews with Mr. Frank Till, Director of Information Services of the National Student Association, July 1976.

[14] Testimony of Yale University, Education Records Hearings, November 11, 1976, pp. 68-69.

PRINCIPAL RECORD-KEEPING PROBLEMS

The Commission's inquiry led it to the following general conclusions with respect to the records post-secondary institutions generate about students.

- While the interests of educational institutions tend to overshadow the interests of students in the collection, use, and dissemination of education records, the more balanced relationship between the post-secondary institution and the student tends to restrict the areas of potential harm to the student that can result from record-keeping practices.
- It is in those areas that have the greatest impact on a student's career, namely in academic performance evaluation and admission to graduate or professional school, that abuses are most likely to arise. It is in these decisions that judgment weighs most heavily, that the basis for decisions can be hard to identify, and that faculty prerogatives are strongest. Thus, a student may perceive that any effort to assert his interest in a record about himself may jeopardize his chances of a favorable evaluation.

TESTING AND DATA-ASSEMBLY SERVICE ORGANIZATIONS

As the number of persons seeking admission and financial aid began to tax the capabilities of post-secondary educational institutions, they formed coalition organizations such as the College Entrance Examination Board (CEEB) and the Law School Admissions Council to help collect and process the information used to make admissions and financial-aid decisions. Through these coalition organizations, post-secondary institutions have since fostered the growth of other organizations that test and assemble information on applicants. Best known among them are the Educational Testing Service (ETS) and the American College Testing Program (ACT).

Testing and data-assembly service organizations have become a gate through which a student's education records must pass if he is to gain admission to accredited institutions and to qualify for certain types of financial aid. The student must pay fees for taking tests and for having information assembled, stored, and forwarded to the educational institutions he designates. Because testing and data-assembly service organizations provide their services under contract to organizations like the College Entrance Examination Board and the Law School Admissions Council rather than to post-secondary institutions, policy regarding their record-keeping practices is set by the former rather than the latter, and the students they serve have no role whatsoever.

Testing and data-assembly service organizations are highly specialized and rely heavily on information supplied to them by the applicant. Their procedures for collecting, generating, and maintaining information are also highly automated. Their sophistication and technical proficiency make them sensitive to record-keeping issues and they have strong fiscal incentives for efficient and effective information management, and do not often make serious errors, but they sometimes have difficulty detecting the errors they do make.

Testing and data-assembly organizations usually inform an individual about the principal uses they make of the information they collect about him. Moreover, their policies generally limit the uses they make of their records to the purposes communicated to the individual. Testing and data-assembly organizations take special precautions to protect individually identifiable data when their records are used for research. They also have strong confidentiality standards. One such organization has repeatedly gone to court to resist attempts by the Internal Revenue Service to subpoena student financial data.[15] Nevertheless, a testing and data-assembly service organization is not in a position to assume total responsibility for record-keeping policies that would operate to safeguard the interests of the individual, since its policies reflect those of its clients, the coalition organizations representing post-secondary institutions. The Commission's hearing record indicates that the oversight post-secondary institutions exercise over the operations of testing and data-assembly service organizations tends to serve their own interests somewhat better than it does the interests of applicants.[16] Thus, although such organizations deal directly with individual applicants, and collect and process mountains of information about them, they are less accountable to the individuals on whom they keep records than any other type of record-keeping institution in higher education.

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

The Origins of FERPA

The growing importance of records about students and of the record-keeping practices of educational institutions has not gone unnoticed. Litigation and the professional literature have drawn attention in recent years to the misuse of personal information in the placement of minority children in programs for the educationally handicapped.[17] Research has highlighted the impact of stigmatization on the educational achievements of children and has pointed to the impact on educational decisions of erroneous or incomplete information about students. Court cases prior to the passage of FERPA in 1974 increasingly recognized that decisions made by schools can result in harm to students and that students and parents must therefore have a right of redress.[18]

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[15] Testimony of Educational Testing Service, Education Records Hearings, November 12, 1976, pp. 301-19.

[16] Testimony of Ohio State University College of Law, Education Records Hearings, November 11, 1976, pp. 159-80.

[17] *Diana v. California Board of Education*, Docket No. C-70-37-RFP (N.D. Calif. 1970); *P. v. Riles*; 343 F. Supp. 1306 (N.D. Calif. 1972), *Aff'd* 502 F. 2d 963 (9th Cir. 1974).

Several studies carried out in the early 1970's documented record-keeping problems in both higher education and elementary and secondary schools. In 1970, the Russell Sage Foundation convened a conference on the Ethical and Legal Aspects of School Record Keeping to clarify principles for the management of elementary and secondary school records. Release of the conference report[19] was followed by a second conference on Student Records in Higher Education and a second report.[20] The recommendations in these reports helped to crystallize concern about the creation, use, and disclosure of school records.

The stimulus for the passage of FERPA was a 1974 study of the National Council of Citizens in Education (NCCE).[21] In this report the NCCE identified the following as the most prevalent abuses in elementary and secondary school record keeping:

- *carte blanche* access to school records by school personnel, law enforcement agencies, welfare and health department workers, and Selective Service Board representatives;
- lack or denial of the right of parents and students to inspect school records, to control what goes into them, and to challenge their contents;
- failure to obtain permission from parents before collecting information on students and their families (for example, before submitting students to psychiatric or personality tests);
- serious abuses in the preparation of student records that follow students throughout their educational careers; and
- failure to inform students and parents when, to whom, and why others are given access to records.

On May 14, 1974, Senator James L. Buckley succeeded in getting a floor amendment to the General Education Provision's Act of 1974 which aimed to correct these problems. The two main provisions of the amendment, which applied to any school that receives Federal funds through the U.S. Office of Education (Department of Health, Education, and Welfare), required procedures to assure students and parents access to those records and restricted disclosure of records to third parties. Although the amendment had not been the subject of Congressional hearings, it was adopted by the conference committee on the General Education Provision's Act later that summer and signed into law on August 21, 1974.[22] At the time, few educators were aware of it.

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[18] *Goss v. Lopez*, 419 U.S. 565 (1975); *Wood v. Strickland*, 420 U,S. 308 (1975); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[19] Russell Sage Foundation, *Guidelines for the Collection, Maintenance, and Dissemination of Pupil Records*, Report of a Conference on the Ethical and Legal Aspects of School Record Keeping, June 12-14, 1972.

[20] Russell Sage Foundation, *Student Records in Higher Education: Recommendations for the Formulation and Implementation of Record-Keeping Policies in Colleges and Universities*, June 12-14, 1975.

[21] National Committee for Citizens in Education, *Children, Parents, and School Records*, 1974, p. 309.

During the weeks after its enactment, however, educational institutions and other interested parties around the country launched a massive letter-writing campaign to members of Congress. At this point, the Senate and House Education Subcommittees and the Department of Health, Education, and Welfare Legislative Office took the lead in working out a compromise measure, which Senator Buckley sponsored. Representatives of educational institutions and of parent and student groups contributed to the drafting of the revision, which became known as the Family Educational Rights and Privacy Act. It was passed by both Houses of Congress and signed into law in December 1974.[23]

The process by which FERPA was enacted had a significant impact on its subsequent implementation. Several factors are important in understanding this impact. First, professional educators were not involved in drafting the original legislation nor even aware of its existence. Although key groups were brought in during the redrafting, their role could only be responsive, not creative, and was, in the main, defensive. Because there had been no national debate or public hearings on the measure, and only a minimum of congressional debate, neither the affected parties (i.e., educational institutions, parents, and students) nor the Department of Health, Education, and Welfare, which had to develop regulations to implement the Act, received much guidance on the manner in which the Act should be interpreted.

Second, FERPA was primarily designed to address documented problems in elementary and secondary schools, but it was made applicable to higher education on the too simple assumption that the problems in both areas are similar and thus that the same principles would apply equally well in both places. Representatives of higher education who participated in drafting the compromise amendment considered the final version to be a vast improvement over the original measure. Nevertheless, they continued to be convinced that FERPA addressed a set of record-keeping problems that were different from those that arise in higher education and thus that the requirements of FERPA would create substantial burdens without benefiting students.

THE REQUIREMENTS OF FERPA

The principal requirements of FERPA are straightforward: they give a student or his parent the right to inspect and review, and request correction or amendment of, an education record maintained about him *[20 U.S.C. 1232g(a)(1) and (2)]*; and give a student or his parents some measure of control over the disclosure of information from an education record about him *[20 U.S.C. 1232g(b)(1)]*. FERPA obligates educational institutions to provide procedures for inspection and review of records within 45 days from the time it receives a request for access to them. *[20 U.S.C. 1232g(a)(1)(A)]* It also exempts the following types of records from parent and student access:

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[22] P.L. 93-380.

[23] P.L. 93-568.

- records maintained by law enforcement units of educational institutions, if such records are maintained separately from other education records and if no exchange of information between those records and other education records is permitted *[20 U.S.C. 1232g(a)(4)(B)(ii)]*;
- medical or psychological treatment records maintained separately from other education records and used only for medical treatment purposes; provided, however, that such records may be seen by an appropriate professional of the student's choice *[20 U.S.C. 1232g(a)(4)(B)(iv)]*;
- so-called "desk drawer notes;" that is, personal records of instructional, supervisory, or administrative personnel that are not shared with anyone else except a substitute *[20 U.S.C. 1232g(a)(4)(B)(i)]*;
- confidential letters of recommendation that were in a student's record before the Act or to which the student has waived his right of access *[20 U.S.C. 1232g(a)(1)(B)(ii) and (iii)(1)]*; and
- records about applicants who have never been students at the educational institution. *[20 U.S.C. 1232g(a)(6)]*

FERPA requires educational institutions to allow students or parents to have a hearing to challenge information in records they believe to be inaccurate, misleading, or otherwise in violation of their privacy rights. It also obligates an educational institution to correct or delete challenged information or, if it refuses to make the requested correction, to insert in the record the student or parent's written explanation regarding the disputed information. *[20 U.S.C. 1232g(a)(2)]*

In addition, FERPA requires written consent from a student or parent before a student's record or any personally identifiable information in it may be disclosed to a third party. Consent is not required, however, when the disclosure is to:

- officials of the educational institution acting in pursuit of a legitimate educational purpose *[20 U.S.C. 1232g(b)(1)(A)]*;
- officials of schools or school systems in which the student seeks to enroll, provided the student is notified of the disclosure, given a copy of the record or information upon request, and has an opportunity to have a hearing to challenge the contents of the record or information *[20 U.S.C. 1232g(b)(1)(B)]*;
- certain Federal and State agencies for auditing and evaluation purposes on the condition that no redisclosure of the record is made and it is destroyed when no longer needed *[20 U.S.C. 1232g(b)(1)(C), (E), and (4)(B)]*;

- accrediting agencies for accrediting purposes *[20 U.S.C. 1232g(b)(1)(G)]*;
- organizations conducting studies for educational purposes on behalf of educational institutions, on the condition that no redisclosure of the record is made and it is destroyed when no longer needed *[20 U.S.C. 1232g(b)(1)(F)]*;
- in an emergency, when necessary to protect the health and safety of the student or other persons *[20 U.S.C. 1232g(b)(1)(I)]*; and
- in response to a judicial order or lawfully issued subpoena, provided that parents and students are notified in advance of compliance with the order or subpoena. *[20 U.S.C. 1232g(b)(2)(B)]*.

FERPA also permits an educational institution to disclose directory information (i.e., information about the identity or status of the student which has been publicly designated by the institution as directory information) without the consent of the student or his parent, provided the student or parent has had a reasonable opportunity to inform the institution that any or all of the information should not be released without the student's prior consent. *[20 U.S.C. 1232g(a)(5)]* An educational institution must keep an accounting of all disclosures requested or obtained, and allow a student or parent to review the accounting. *[20 U.S.C. 1232g(b)(4)(A)]*

FERPA instructs the Secretary of Health, Education, and Welfare to promulgate regulations to protect the rights of students and their families in surveys or data-collection activities conducted, assisted, or authorized by the DHEW or an educational institution. *[20 U.S.C. 1232g(c)]* Finally, it places a requirement on educational institutions to inform students and parents of their rights under the Act. *[20 U.S.C. 1232g(e)]*

FERPA applies to any institution receiving U.S. Office of Education funding and provides for the termination of such funding if an institution fails to comply with it and compliance cannot be secured voluntarily. *[20 U.S.C. 1232g(f)]* DHEW is required to set up an office and a review board to investigate, review, and adjudicate violations and complaints alleging violations. *[20 U.S.C. 1232g(g)]*

The Commission believes that FERPA represents a reasonably successful attempt to establish a clear set of minimum requirements for the protection of students' and parents' privacy rights. At the same time, its gives each educational institution considerable latitude in establishing its own procedures to fulfill these requirements. Ironically, FERPA's most specific provisions are the exceptions to its requirements, and most of them were added at the request of representatives of educational institutions and Federal agencies during the drafting of the compromise measure.

REGULATIONS IMPLEMENTING FERPA

In preparing the regulations, DHEW consulted extensively with representatives of educational institutions, and generally did not interpret the Act in such a way as to reduce the flexibility given educational institutions by the statute. The regulations require educational institutions and agencies to formulate a policy that specifies their procedures for effectuating the rights given students and parents by FERPA. Insofar as disclosure is concerned, the policy must specify rules and criteria for determining which educational purposes are legitimate and which school officials within the institution or agency can gain access to records. It must also specify what categories of information are to be considered directory information. The regulations include broad guidelines for hearing procedures, general conditions for disclosure in emergencies affecting the health and safety of an individual, and a definition of the term "student" that denies students in one component of an institution (an undergraduate college, for example) access to their admissions records in another component of the same institution (such as a law school or medical school).

The statute did not require DHEW to review and approve each institution's policies, or to pass judgment on the substance of policies when complaints are made, and the Department has not done so. Responsibility for judgments of that sort has been left to local institutions, and wisely so in the view of the Commission.

Experience in Implementing FERPA to Date

The implementation of FERPA has been plagued by confusion, misunderstanding, and delay. Because the Congress did not authorize additional funds for DHEW to implement the law, the Department has not been able to spend much money doing so. The Department's small Fair Information Practice Staff was designated as the office responsible for developing and promulgating the regulations required by the statute, answering questions and offering assistance in interpreting the statute and regulations, handling complaints about violations of FERPA requirements, and mediating solutions to conflicts over interpretations.

The FERPA regulations were not issued until June 1976, some 18 months after passage of the Act. Inadequate staffing and funding were not the only reasons for the delay. Extensive consultations with representatives of educational institutions took time, especially because many educators were still poorly informed about FERPA and resistant to Federal government regulation of any sort. As a consequence, many institutions did nothing to implement the Act pending the issuance of the regulations, while others attempted to develop policies based on interpretations derived from the Russell Sage and NCCE studies or those developed by their legal counsels.

The long delay generated confusion and misunderstanding that was not easily alleviated by issuing the regulations. While the DHEW staff was available to answer questions, not many educators turned to them for answers, and there was no systematic program to inform school officials or the public about the law. Rumors and misinterpretations have been widespread. For example, the Privacy Commission received an indignant complaint from an educator responsible for record-keeping policy in a large elementary and secondary school district who did not know that FERPA regulations, issued six months previously, had completely obviated the complaint.

Another serious implementation problem arose because FERPA was introduced into an environment that has come to expect the Federal regulatory role to be prescriptive. The underlying strategy of FERPA, which leaves to educational institutions most of the responsibility for defining the details of procedures to assure individual protection, has been viewed by educators as a weakness rather than a strength of the law. For example, the president of a local university recently complained to a reporter from the university's student newspaper that "the Buckley Amendment is one of the prime examples of poor legislation, poor administration and everything that goes into it. Just about every institution has a different interpretation of FERPA."[24]

What educators perceive to be ambiguity has led many of them to make unnecessarily labored and highly defensive interpretations of the law. Instead of taking the latitude afforded by the statute as a challenge to their professional skill, and as an opportunity for innovation in concert with parents, students, and colleagues, educators have turned to their legal counsels for safety. In many cases, legally sound advice has been unnecessarily burdensome and on occasion educationally unsound.

In the Commission's judgment, the major problem in implementing FERPA has been the lack of understanding among educators, parents, students, and the general public both about the requirements of the Act and the strategy of enforced self- regulation that underlies it. Where understanding of these factors exists, the Commission has found little objection on the part of educational institutions to either FERPA's principles or its requirements.[25] Contrary to their expectations, educators have found that offering students and parents access to their records does not unleash a tidal wave of demands for access and correction that immobilizes educational institutions. Implementing FERPA has not been burdensome for those institutions with sound record-keeping practices, or for those that have sought in good faith to develop policies consonant with the spirit of the law.[26]

A few of the complaints about unnecessary burdens are doubtless justified. Examples of possibly burdensome requirements include the requirement to keep a record available to students and parents of all requests for disclosure, whether granted or not *[20 U.S.C. 1232g(b)(4)(19)]*; the requirement to identify and list all record systems in a central place rather than simply requiring each component to have such a list available on request *[45 C.F.R. 99.5(2)(iv)]*; and the requirement to allow a student to restrict the disclosure of any or all categories of directory information. *[20*

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[24] Jane McHugh, "GW Witholding Iranian Info," *The Hatchet*, February 17, 1977, p. 3.

[25] See, for example, Testimony of Franklin and Marshall College, Education Records Hearings, November 11, 1976, pp. 9-15; Testimony of San Diego Unified School District, Education Records Hearings, October 7, 1976, pp. 207-22 and pp. 250-59; and Testimony of University of California, Los Angeles, Education Records Hearings, October 8, 1976, pp. 487-89.

[26] Testimony of San Diego Unified School District, Education Records Hearings, October 7, 1976, pp. 252, 274-76.

U.S.C. 1232g(a)(5)(B)]; In addition, educators in some elementary and secondary schools have found restrictions on the sharing of information with social services agencies unnecessarily burdensome, and some schools at all levels have found it difficult to control access to student files by federally funded researchers.

Claims that FERPA imposes unreasonable costs appear to be largely rhetorical. Typical of the rhetoric is the statement of a university administrator that universities are "stockpiling lawyers like countries are stockpiling nuclear warheads in the cold war."[27] In reality, this administrator's own large State university has met the added burden of FERPA requirements by retaining the part-time services of an attorney who was also enrolled as a graduate student.

In response to the Commission's direct request for data on the cost of implementing FERPA, only one institution produced evidence of extra expenditures. Its estimate, after careful analysis, was that FERPA cost about one extra dollar per year per student and, in doing the analysis, it discovered several places in which the flexibility FERPA allows would enable it to cut even that cost without detriment to the individual student.[28] Had the cost of implementing FERPA been as great as the rhetoric would suggest, the Commission's request for data would surely have produced budgeting and planning documents reflecting the costs from institutions that had found them to be burdensome. While there are obviously some costs incurred in implementing the law—an extra page or two of printing, an extra form for those who wish directory information withheld, and the cost of discussions with faculty, staff, and administrators—it seems safe to infer that they are insignificant.

The cost of implementing FERPA depends of course on the quality of an institution's records and the efficiency of its record-keeping practices prior to the enactment of the statute. If the quality of an institution's records were so poor that it receives many requests to correct them, or is subjected to other legal action, then the cost of implementing FERPA might very well become substantial. The prospect of such costs provides a valuable incentive to develop better record-keeping policies and practices.

Even when policies are well conceived, difficulties can arise in implementing them. At the elementary and secondary school level, there are strong indications that in a large school district with a *uniform* policy, there is often little uniformity of *practice* among schools within the district. Parent and student groups have documented the allegation that student records are still being disclosed to law enforcement agencies without notice to, or authorization from, students or parents and that, in some cases, "desk drawer" notes have been used as official records, rather than solely as the personal records of a teacher.[29] Student groups testified to the Commission that universities or faculty members were subtly coercing students into waiving their right of access to letters of recommendation.[30] Further, the Commission could find little evidence that educational institutions are doing a very good job of informing students and parents of their rights under the Act.

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[27] Testimony of National Association of State Universities and Land Grant Colleges, Education Records Hearings, October 7, 1976, p. 252.

[28] Testimony of San Diego Unified School District, Education Records Hearings, October 7, 1976, p. 270.

The Commission found substantial evidence that neither parents nor educators consider the system for enforcing FERPA satisfactory, as it depends on complaints being filed with DHEW for mediation, and the only sanction for failure to comply with the law is withdrawal of all U.S. Office of Education funding. DHEW has not received many complaints, possibly because Washington seems too far away, or because the only available sanction is so harsh that it is rarely ever imposed and thus is not credible, or because the sanction would not in any case secure the desired result—prompt compliance. Educators resent, in principle, the idea of withdrawal of Federal funds and view its threat with disdain because it is not likely to be exercised.

THE INDIVIDUAL UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

In spite of the limited and rather uneven implementation experience to date, the Commission was able to draw some reasonably reliable conclusions about the degree to which practices under FERPA meet the Commission's recommended public-policy objectives. The concerns expressed in its objectives are precisely those that led to the passage of FERPA: namely, minimizing intrusiveness; keeping recorded information from being a source of unfairness in decisions made on the basis of it; and establishing a legitimate, enforceable expectation of confidentiality. The complaints and abuses documented by parent and student groups, and the guidelines from the two Russell Sage studies cited above, also centered on these three objectives.

The statute, however, does not fully achieve the Commission's three objectives. There are significant gaps in its coverage of institutions and types of records, and the enforcement mechanisms it relies on are too weak to support its strategy of enforced self-regulation.

CONTROL OVER THE COLLECTION OF INFORMATION

FERPA seeks to minimize intrusiveness in several ways. It requires educational institutions that collect and maintain records about students to pay due regard to the "appropriateness" of information and the privacy rights of students. Currently, the only tool for enforcing it is the right of the student or his parent to inspect and challenge the contents of records. Although FERPA specifically requires the DHEW Secretary to issue regulations to protect the privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by an administrative head of an educational agency, the regulations have never been issued.

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[29] Testimony of Stefan Javanovich, Urban Research Policy Institute, Education Records Hearings, October 7, 1976, pp. 121-24.

[30] Testimony of University of California Student Lobby, Education Records Hearings, October 8, 1976, pp. 563-70; and Testimony of National Student Association, Education Records Hearings, November 12, 1976, pp. 394-95.

As the first section of this chapter indicates, intrusiveness in elementary and secondary schools is a serious problem, not only of surveys but also in the routine creation of records on students. An individual has little control over data collected directly from him, generated from observations of his behavior, or created by analysis of his student record. Yet FERPA does not address such collection and recording of information.

Reliance on access and correction as a remedy for intrusiveness has several deficiencies. Access and correction are at best remedial, not preventive, and do not address the problem of stigmatization. Parents are not and could not be notified of every entry made in the record of a student, so that substantial harm can be done before they can request correction of stigmatizing information. A student is stigmatized less by a particular item of information than by the composite impression the record as a whole conveys, which makes it difficult for parents to determine which items should be corrected or amended. An addendum to the record giving the student's or parent's side of the story seldom repairs damage to a student's reputation.

In addition, individual access to a record and the right to request that it be corrected cannot lead to preventive action in a highly decentralized system unless specific abuses are either concentrated in one location or are prevalent. If a serious abuse occurs only rarely, steps to prevent its recurrence may be taken only at the location where the abuse occurred, not throughout a system.

Intrusiveness is a problem of information collection. It is simply not realistic for students and parents to exercise control over what information is collected, but it is realistic for institutions to establish standards of propriety and relevance. Adequate standards not only minimize intrusiveness, but provide a context in which the individual can effectively exercise his right to challenge the content of a record, and thereby help the institution to maintain and improve its standards.

Intrusive surveys and other data collection activities are a major problem. Students are a captive population and as such are vulnerable not only to intrusive questioning but also to dangers that arise simply from too much questioning. As pointed out earlier, individuals in component units of decentralized systems often have the autonomy and incentive to authorize or engage in surveys and other data-collection activities. Part of the reason that DHEW has been slow to issue regulations applicable to these activities is that the Department has already promulgated regulations to protect the rights of all human research subjects *[45 C.F.R. 46 et seq.]* and is now in the process of revising them. Nevertheless, the regulations covering human research subjects apply only to DHEW funded activities, and leave to the

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data collector rather than the educational institution the responsibility of defining the interest of the individual in that research.

Although most of the data-collection activities in schools are sponsored by the Federal government, and the organizations carrying them out are covered by the research on human subjects regulations, some are not. Moreover, what the researcher, educator, and parent might consider appropriate may differ substantially. Parental complaints about intrusive surveys and other data-collection activities were one reason for the enactment of FERPA;[31] yet intrusive data-collection activities continue, notwithstanding DHEW's regulations regarding research on human subjects.

In post-secondary institutions, intrusiveness is not a major problem either in routine record keeping or in special data-collection activities. The organization and management of information by purpose and the comparatively clear standards for the content of records are important protections in themselves. The admissions process does, however, pose intrusiveness problems by virtue of the fact that FERPA places no obligation on an institution to establish standards of relevance and propriety with regard to the information collected and used in the admissions process, or to inform the applicant of the types of information that will be collected about him, and also by virtue of the fact that FERPA allows admissions records containing highly subjective information about him to be kept secret. *[20 U.S.C. 1232g(a)(6), (a)(B)(ii) and (iii); 45 C.F.R. 99.12(2) and (3)]*

Another intrusiveness danger arises in institutions that have law enforcement or campus security units that engage in investigative activities. FERPA tries to build a wall between the records maintained by such a unit and those maintained by the rest of the educational institution. It does so by exempting the records of a law enforcement unit from the FERPA access and correction requirements, provided the law enforcement unit's records are used and disclosed solely for law enforcement purposes, and the law enforcement unit does not have access to education records. *[20 U.S.C. 1232g(a)(4)(B)(ii); 45 C.F.R. 99.3]* This creates a problem because some of the information a law enforcement unit collects can be useful in maintaining school order and discipline. Yet, if a law enforcement unit shares such information with other school officials, even on a limited basis, *all* of its records must be open to student or parent access and no record maintained by the unit could be shared with local law enforcement agencies without student or parent consent, even though it could be disclosed and used widely within the educational institution. Most importantly, FERPA imposes no requirement that standards of appropriateness, relevance, or accuracy for such information be established and the Commission has found that the current statute in fact encourages a law enforcement unit to share information surreptitiously with other components of an educational institution.[32]

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[31] National Committee for Citizens in Education, *op. cit.*.

PROTECTIONS FOR FAIRNESS

Fairness is a major objective of FERPA. The basic tools for achieving it are the right of a parent or student to inspect, review, and challenge the contents of his record; and the obligation levied on the institution to provide a hearing, to correct or delete the challenged portion of a record, or to incorporate into the record a parent or student's explanatory statement. Again, however, these tools are not enough to achieve the Commission's objectives.

Particularly in elementary and secondary schools, the record-keeping practices that lead to unfairness also weaken the effectiveness of access and correction rights as protections against unfairness. Identifying unfair record-keeping practices requires the ability to relate records to decisions. In the educational process, however, parents are often unaware that important decisions are being made about their children. In fact, schooling can be looked upon as a continuous set of decisions, and it is unlikely that an institution could keep parents informed of each and every decision made about their child even if it tried to do so. Moreover, if rights of access and correction are tied to "adverse decisions," as the Commission recommends in other chapters of this report, is difficult to do in education because it is so difficult to define an adverse decision. Is placing a child in a compensatory program, for example, an "adverse" decision?

There are, of course, many decisions about which parents are informed, such as promotion, major disciplinary actions, or placement in particular academic programs. In some of these decisions, the role of records is clear and it is easy to label a certain outcome as negative or positive for the student. There are, however, many more decisions made about students that either parents do not know about, that are not clearly based on easily identified items of information, or whose effect on the child is difficult to assess. Such decisions can be based on so many factors that it is difficult for a parent to assess whether information in a record is inaccurate, misleading, or irrelevant as it relates to the decision. Standing alone, the right to inspect and request correction of a record places the total burden for assuring the reliability of records on the individual who often does not understand the system well enough to use the right effectively.

Particularly at the elementary and secondary level, there are also pressures on a student or his parent not to exercise such rights lest they be stigmatized as troublemakers or malcontents. In any relationship between an individual and an institution that has discretion to grant or deny him a benefit, there is the danger that the individual will be penalized for exercising a record-keeping right, unless the institution has strong incentives, legal or economic, not to retaliate. As far as schools are concerned, testimony presented to the Commission confirmed that educational institutions do sometimes retaliate, and that a number of parent and student organizations believe that they do so frequently.[33] Moreover, as pointed out in the discussion of intrusiveness, access and correction rights for individuals are at best remedial, not preventive, and do not readily lead to systemic improvements. An individual can contribute to improving the quality of information about him in records, but only if he knows what the record-keeping standards of an institution are. FERPA does not address the issue; it neither places an obligation upon educational institutions to establish standards nor requires that parents and students be informed about the record-keeping standards of the institution.

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[32] Testimony of Los Angeles Unified School District, Education Records Hearings, October 7, 1976, pp. 10-26, 40-45; and Testimony of Juvenile Services Division, Los Angeles Police Department, Education Records Hearings, October 8, 1976, pp. 288-91, 303-07, 309-20.

Because elementary and secondary schools treat individuals over time, they engage in substantial problem diagnosis. Hence, like any other treatment institution, they have established dual record systems—the official records kept by the institution and the so-called "desk drawer" notes that individual teachers, administrators, or ancillary personnel keep primarily for their own use. The latter type of record usually contains observations, impressions, questions, or even tentative interpretations and diagnoses. FERPA recognized that student or parent access to such information can be a two-edged sword in that it can deter the keeping of records and knowledge of what is in the records can impede an individual's course of treatment. Therefore, FERPA tried to balance the need for this type of record against the equally compelling argument that access to records by their subjects is an essential component of fairness in record keeping. The FERPA solution was to exempt desk drawer notes from student or parent access provided they are not revealed to any person other than a person substituting for the note taker. Educators have argued that this has reduced the value of such notes and thus has discouraged school personnel from keeping them. Educators argue that desk drawer notes work to the overall benefit of the student, but some parent and student groups contend that the notes of administrators with disciplinary responsibilities have in effect become secret record systems used to support disciplinary decisions.

In higher education, access and correction rights to most records are effective tools because institutions have standards for the content of records and their use. Nonetheless, when standards for the content of records are not clearly established, or when students are not clearly informed of those standards, as is the case with departmental records, the inadequacies of these FERPA requirements are the same as in elementary and secondary school systems. The pressures against the exercise of such rights are even stronger in post-secondary institutions than they are in elementary and secondary schools because the emphasis on professionalism and on the autonomy of faculty members is much stronger. The student is so dependent upon the professional judgments of individual faculty members that he is not likely to risk prejudicing them by asserting his rights.

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[33] Testimony of Parent Education Center, Education Records Hearings, October 7, 1976, pp. 172-84; and Testimony of American Civil Liberties Union's Student Rights Center, Education Records Hearings, October 8, 1976, pp. 360-64.

An equally serious problem in post-secondary education is that FERPA grants no right of access or correction to records regarding admissions. This is the one area in which access and correction rights alone could be important protections. As in admissions, a record is compiled for a single decision of unquestionable importance to the individual. To assure fairness in making admission decisions, an individual needs to be able to challenge the contents of a record and request its correction so that the record will truly reflect facts about himself, his background, and his previous performance. Denying the applicant access to his admissions record and an opportunity to request correction of it leaves a serious breach in his defense against unfairness. This is especially true for a rejected applicant, because a successful applicant can have access to his admission record when he becomes a student, as such records must by law be maintained for 18 months.

The FERPA provision that permits a student to waive his right of access to letters of recommendation is another loophole in the statute that has special import for post-secondary students. While FERPA recognizes the individual's right to inspect such letters, the waiver provision can have the effect of placing a student under substantial pressure to relinquish his right at a time when he is most vulnerable to pressure. Empirical evidence presented to the Commission indicates that waiving one's right of access to a letter of recommendation has no discernible impact on the content and quality of such letters, although the myth persists that a student's refusal to do so inevitably debases the quality and thus the usefulness of the letter.[34] One university proposed barring waivers, but had to withdraw the proposal in the face of student assertions that accepting it would weaken their competitive position for admission to other institutions.[35] This is an even greater problem than it might otherwise appear to be by virtue of the fact that there are no content standards for letters of recommendation.

Another major deficiency of FERPA is that it does not aply to testing and data-assembly service organizations. Hence, an applicant has no legal right to inspect and challenge information in their files. This is significant because, despite their elaborate quality control procedures, the testing and data-assembly organizations have been known to transmit erroneous information about an individual,[36] and to be unable to detect errors that do not occur on a large scale. In addition, these organizations create records without the knowledge of the individual, such as lists of "unacknowledged repeaters,"[37] or "weighted" scores for individuals based on information supplied by the client institution. Such secret records or special scores may stigmatize an applicant or student (as when "unacknowledged repeaters" are branded as "cheaters") or subject the individual to an adverse decision (as when an applicant is rejected because his "weighted" score is too low).

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[34] Testimony of Ohio State University College of Law, Education Records Hearings, November 11, 1976, pp. 177-78; and Testimony of National Association of State Universities and Land Grant Colleges, Education Records Hearings, November 11, 1976, p. 127.

[35] Testimony of National Association of State Universities and Land Grant Colleges, Educational Records Hearings, November 11, 1976, p. 127.

[36] See, for example, Testimony of Ohio State University College of Law, Education Records Hearings, November 11, 1976, p. 163 and pp. 184-185; Testimony of Ralph Nader, Education Records Hearings, November 11, 1976, pp. 216-217; and Testimony of Educational Testing Service, Education Records Hearings, November 12, 1976, pp. 348-55.

Finally, FERPA makes no provision for an individual at any level of schooling to have a decision based on erroneous, incomplete, or inappropriate information reconsidered. The Act merely provides that a student or his parent can request correction or amendment of a record. Although there are due process mechanisms in schools that can be used to force reconsideration when the decision is a major one, many decisions do not lend themselves to formal reconsideration, nor is correction or amendment of a record always enough to repair or halt the damage. In decentralized educational organizations, corrections or amendments may not be propagated throughout the systems; and in large systems, where administrative decisions are separated from the process of correcting or amending records, corrections may not come to the attention of decision makers. Moreover, in certain types of selection processes where there are more applicants than available places, as in the case of programs for gifted children or admission to professional schools, the institution may have strong incentives to overlook a correction or amendment made by a rejected applicant. The right to correct an erroneous record may be a hollow remedy if the individual has no way to challenge a decision based on that record.

CONTROL OVER DISCLOSURE OF INFORMATION

Limiting the disclosure of education records is a primary goal of FERPA. The Act firmly establishes the principle that parent or student consent for disclosure of all education records is the rule, rather than the exception. Its restrictions extend even to those records maintained by schools that are not commonly considered education records. For example, law enforcement records maintained by schools may be disclosed only for law enforcement purposes and only to law enforcement agencies of the same jurisdiction *[20 U.S.C. 1232g(a)(4)(B)(ii)]*; medical records may be disclosed only for medical treatment purposes *[20 U.S.C. 1232g(a)(4)(B)(iv)]*; desk drawer notes may be seen only by substitutes *[20 U.S.C. 1232g(a)(4)(B)(i)]*; and letters of recommendation may be used only for the purpose for which they were acquired. *[20 U.S.C. 1232g(a)(1)(C)]* Moreover, exemptions from the requirement of parental or student consent for disclosure are all conditioned on an assurance that records will not be redisclosed. *[20 U.S.C. 1232g(b)(4)(B)]* A school's policy under FERPA must state the criteria by which it decides which school officials may have access to records and for what purposes. *[45 C.F.R. 99.5]* When records are transferred to another school, parents must be notified and given a copy of the record, and must have an opportunity to challenge the contents of the record in a hearing. Auditors, evaluators, or researchers who are allowed to have access to records without parent or student consent must destroy their copies of the records when they are no longer needed. *[20 U.S.C. 1232g(b)(1)(F); 45 C.F.R. 99.31]* Pursuant to FERPA, a student can bar disclosure of any item of directory information in his record. *[20 U.S.C. 1232g(a)(5); 45 C.F.R. 99.37]*

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[37] "Unacknowledged repeaters" are individuals who have taken an examination, particularly the Law School Admissions Test, previously but fail to indicate on their application form that they have taken such a previous examination; see Kim Masters "ETS's Star Chamber," *The New Republic*, February 5, 1977, pp. 13-14.

Despite these protections, the extensive exceptions to the basic presumption of confidentiality create problems. Some of the exceptions weaken an educational institution's ability to prevent disclosure when it wishes to do so. This is particularly true with regard to Federal agencies seeking access to student records for evaluation or research purposes. Although Federal and State agencies can receive student records only on the condition that they do not redisclose them, no *written* agreement barring redisclosure is required, and therefore neither the institution nor the individual can hold Federal or State agencies, or their contractors, accountable for failure to abide by the redisclosure prohibition. Moreover, when government agencies request access to information in individually identifiable form, they do not have to show that such access is either required by law or demonstrably necessary to accomplish the purpose for which they are requesting the information. Once such an agency has information about a student, neither FERPA nor the Privacy Act of 1974, in the case of Federal agencies, prevents the information from being passed from agency to agency within Federal or State governments without obtaining the consent of the individual to whom it pertains.

Another weakness in FERPA's confidentiality provisions involves the use of records for research purposes in a decentralized system. FERPA does not require central review of requests for access to education records for research purposes, nor does it require that parents or students be notified that records will be used for such purposes.

A major confidentiality problem arises from FERPA's failure to require student or parent consent to the disclosure of records maintained by school law enforcement units or security forces to law enforcement officials of the same jurisdiction. The main concern in this regard was that school law enforcement units were, or would become, conduits for information about a student's behavior, background, and character. Although this problem affects only a limited number of students—an alleged juvenile delinquent in elementary and secondary school, or a radical activist in higher education—it has great import both for these students and for an educational institution.

The relationship of educational institutions to law enforcement agencies varies according to the social, economic, and cultural environment in which a school or school system operates. FERPA, however, gives an educational institution almost no flexibility in dealing with disclosure to law enforcement agencies.

There are other examples of inflexible disclosure rules in FERPA that work to the disadvantage of the student, the school, or other institutions, or all three. For example, a school's relationship with social services agencies varies from community to community. FERPA, however, does not take account of these different working relationships. The Act dictates one inflexible rule regarding disclosure—that school records may not be disclosed to social services agencies without student or parent consent. FERPA leaves no flexibility for sharing any information about students with any social service agency for any purpose except in connection with a financial-aid program. For example, under a strict interpretation of FERPA, schools cannot assist local services agencies that provide clothing to needy children, by giving these agencies information to identify potential candidates. Nor can schools report cases of possible child neglect to local services agencies without parental consent.

The same lack of flexibility is apparent in the FERPA provision that permits disclosures for research purposes without individual consent *only* if the research is done for, or on behalf of, an educational institution for a specific educational purpose. As Chapter 15 of this report points out, because administrative records are a vital tool in research and statistical activities they should be available for research or statistical purposes provided that stringent precautions are taken to protect the individuals to whom the records pertain from harm.

Finally, it is puzzling that, of all of the exemptions from FERPA's restrictions on disclosure without individual consent, the exemption for the least sensitive information—directory information—is qualified by rigid protections for the individual. FERPA permits an individual to bar the disclosure without his consent of any or all directory information. The requirement is an economic and administrative burden whether many or only a few students exercise the option. In addition, the requirement has frustrated press access to information, made it possible for individuals to claim credentials or honors falsely without fear of being discovered, and will even make it difficult for the Bureau of the Census to get resident student housing information necessary for drawing census sample frames for the 1980 Census. Moreover, the requirement effectively limits the freedom of many States in creating or modifying public-record and freedom of information statutes. If such statutes were to designate as a matter of public record information included under FERPA as directory information, the State would force educational institutions to choose between losing needed Federal funds or being in violation of State law.

THE FERPA ENFORCEMENT MECHANISMS

Statutory protections are seldom effective unless the statute provides strong incentives to comply or credible sanctions for failure to comply, or both. Unfortunately, FERPA provides neither. In this respect, FERPA's "enforced self-regulation strategy" is deficient in that it calls for educational institutions to exercise substantial discretion in formulating procedures while failing to make them locally accountable for doing so. Enforcement of FERPA must begin with a complaint to DHEW, and the only penalty for failure to comply is a financial sanction that lacks credibility because it is so rarely used.

FERPA and its implementing regulations depend on four mechanisms to achieve "enforced self-regulation": (1) educational institutions must provide parents and students with the means to exercise the rights the Act establishes; (2) educational institutions must inform parents and students of their rights and the procedures for exercising those rights; (3) the Department of Health, Education, and Welfare must establish an office to investigate, process, review, and adjudicate violations; and (4) if adjudication fails, termination of Federal funding through the U.S. Office of Education is a last resort.

While these mechanisms may be theoretically sound, in practice they give the individual little protection. Abuses of FERPA requirements normally occur at the operational level, and are perpetrated by individual employees at a specific school. The effectiveness of FERPA currently depends upon more centralized control than most educational institutions have. What should be required instead is local handling of complaints and internal sanctioning systems. The entire burden of enforcement of FERPA currently falls on parents and students, but the only way for an individual to exercise the initiative that will lead to enforcement is to file a formal complaint to DHEW. This process is not only burdensome to the individual, but is unlikely to provide timely relief, and is therefore not likely to be used.

The sanction of total withdrawal of Federal funds is so disproportionate to the nature of most FERPA violations that it lacks credibility and thus serves only as a poor incentive for institutions to prevent or correct systematic violations or unfair practices. In addition, it does nothing to redress injustices to a particular individual. The penalty, if enforced, would in effect punish all students and parents, including those whose rights have been violated, by forcing the curtailment of essential educational programs. Moreover, it would nullify FERPA's protections since it would remove the sanctioned institution from FERPA's jurisdiction.

Thus, the individual who tries to protect his rights has little hope of success, and if he succeeds, he may threaten the survival of the educational institution, thereby diminishing the well-being of other students and parents as well as his own. The net result is that an individual's rights will only be protected, as they were before FERPA, by the initiative and sense of responsibility of the educational institution. FERPA itself, may, however, undermine even that protection. By failing to obligate institutions to monitor their own practices, and by giving students and parents the role of monitoring practices and reporting the institution's misdeeds to the Federal government, FERPA stresses an adversary, not a cooperative, relationship. In so doing, it forces an aggrieved student or parent who has complained to DHEW to assume the risk that the school will retaliate and puts the school in a defensive posture toward its students and their parents.

RECOMMENDATIONS

As a result of its inquiry into educational record-keeping practices and its analysis of the Family Educational Rights and Privacy Act, the Commission has concluded that even with FERPA, the interests of students and parents in education records and record-keeping practices are not well enough protected. Serious gaps in the coverage of FERPA make this situation particularly serious in the admissions processes of post-secondary institutions.

If students and their parents are to be protected properly from intrusive or unfair practices in the collection, use, and dissemination of education records, educational institutions must bear a large part of the burden for protecting them. Relying solely on individuals to protect their own interests simply is not good enough in view of the broad authority that educational institutions must have to carry out their missions. To give an individual all the procedural protections he would need to safeguard his own interests in every decision made about him, could well paralyze the educational system. On the other hand, sole reliance on institutional responsibility for the protection of an individual's interests in record keeping would require prescriptive regulation by Federal or State governments that would have its own paralyzing effect.

While institutions recognize the need to protect the interests of students and parents, the bureaucratic setting that dominates most educational institutions today tends to make institutional interests in record-keeping practices overshadow those of the individual. There is a serious imbalance between an institution's incentive to protect its own interests on the one hand, and its incentive to protect student interests on the other. FERPA does little to correct this imbalance.

Since the quality of education always depends ultimately on human judgment, protections must be designed carefully so that they will not lead to further depersonalization in the relationship between student and institution. An educational institution must make difficult and sensitive decisions regarding such things as the placement of children in special programs, the admission of only a few qualified applicants to a graduate or professional school, and the choice of the proper mix of rewards and punishments to help a child learn social responsibility. There is already great pressure on schools to rely on information about individuals that has been converted into standard measurements of ability or performance, and to use it to make decisions in a way that eliminates the consideration of individual differences. Such processes are often adopted without considering their impact on society and on the individual. Overly restrictive protections for the individual often cause educators to rely even more heavily on decision making based on standard measurements in order to protect themselves against the threat of liability to the individuals affected by the decisions. Until quite recently, education records mattered little in the educational process. They have now become significant. Record keeping has evolved to meet many changes and pressures, but the evolution has occurred at the expense of students' rights. The situation requires not the rapid imposition of untested requirements to restore the balance, but a careful reshaping of the record-keeping practices of educational institutions so that all of the stakeholders will be fairly represented.

In sum, the Commission finds that FERPA is a solid foundation upon which to restore the balance in educational record-keeping practices between the interests of students and parents and the needs of educational institutions. FERPA not only recognizes the individual's interest in education records, and provides the baseline for developing a minimum set of rights and responsibilities, but does so with a sound sense of both the limits of regulation and the proper roles of the various parties in implementing its requirements. Nevertheless, further steps are needed to achieve a proper balance.

The Commission's approach to formulating protections for the individual's interest in education records is not to limit the authority of educational institutions, but to strengthen the accountability of those institutions to the individual and to society. The Commission's approach depends on the tradition of stewardship among educational institutions and seeks ways that will make institutions continually aware of, and responsive to, that tradition.

Educators recognize that they have a stake in protecting and promoting the interests of the individual and in maintaining public confidence in their ability to do so. Not all of them recognize that their record-keeping practices are undermining that confidence among citizens generally, as well as among students and parents. The fear and mistrust of schools may be vague, ill-defined, and sometimes unjustified, but it exists nonetheless. Educators are only beginning to be aware of these attitudes. The Commission places great emphasis on the value of openness, both to dispel unfounded fears and to identify and resolve real problems.

In formulating its recommendations, the Commission had three objectives:

(1) to expand and strengthen FERPA's minimum requirements so as to place additional responsibility for the quality of records and record-keeping practices on educational institutions, and to broaden the spectrum of institutions and records subject to the Act's requirements;

(2) to make educational institutions more accountable for their record-keeping practices than they now are by giving the individual effective remedies for specific abuses; putting record-keeping policy and practice on the agenda of local bodies and groups that hold educational institutions accountable for their actions; limiting Federal enforcement to cases of systemic abuse; and providing more effective Federal sanctions; and

(3) to expand the latitude of each educational institution or agency in meeting its increased responsibilities and adapting the basic requirements of FERPA to local circumstances within the context of strengthened accountability.

EXPANDING AND STRENGTHENING INSTITUTIONAL RESPONSIBILITY

FERPA currently forbids an educational institution or agency to have a policy that denies individuals the rights recognized by the statute, but does not require an affirmative policy to implement the Act's requirements. The

Department of Health, Education and Welfare sought to remedy this deficiency by promulgating regulations that require institutions to formulate and adopt affirmative policies. *[45 C.F.R. 99.5]* The Commission agrees that to create the conditions under which an individual can exercise his rights under FERPA, and to foster an atmosphere of cooperation rather than confrontation, institutions must be required to take affirmative steps to meet their obligations to the individual and to create policies and procedures consistent with FERPA requirements. Therefore, the Commission recommends:

Recommendation (1):

That the Family Educational Rights and Privacy Act be amended to require an educational agency or institution to formulate, adopt, and promulgate an affirmative policy to implement FERPA requirements, as well as the additional requirements recommended by the Commission.

ADDITIONAL INSTITUTIONAL OBLIGATIONS

FERPA and the DHEW regulations oblige educational institutions only to assure that individuals are given the opportunity to inspect and correct their records and to exercise limited control over the use and dissemination of those records. The Commission believes, however, that an educational institution should be obligated to protect the interest of a student or parent in an education record it maintains. The institution's obligation should be threefold: (a) to attend to the content and quality of the records it maintains on individuals; (b) to provide redress for an individual when a decision has been based on a record subsequently found to be erroneous, incomplete, misleading, or otherwise inappropriate; and (c) to protect the rights of students whenever it permits or undertakes survey and other data collection activities.

The problem of standards for the content of records is crucial, both for effective educational service delivery and protection of the individual. The relevance and necessity of each category of information, the reliability of information for certain types of decisions, the accuracy and completeness of information in an anecdotal record, and the appropriateness of sources and reporting standards for records are all significant problems for educational record keepers, especially those in elementary and secondary schools. Many of the complaints that led to FERPA's passage were directed at institutional failures to assure the quality of education records and the resulting unfair treatment of students. The Commission realizes that setting such standards is difficult and is well aware of the lack of consensus about the need for standards and what the standards should be. It does not believe that the government should set standards, except where there is a clear consensus about the need for them and what they should be. It does believe, however, that an institution must assume responsibility, and be accountable, for the content and quality of its records about individuals.

Levying responsibility for the content and quality of records on educational institutions would not totally prevent the inclusion of erroneous, incomplete, or misleading information in them. It would, however, reduce the recording of such information, and would assure that the individual's rights of access and correction are not the only means by which the quality of records is monitored.

Correcting a record does not assure that previous decisions based on it will be reviewed or corrected because there is no assurance that the correction will come to the decision maker's attention, or even if it does, that the decision maker will reconsider his previous decisions. Hence, the Commission believes that an educational institution should be required to take steps to assure that decisions based on inaccurate information are reviewed. The Commission's intent is not to allow a challenge of the substance of a decision if the inaccurate information had no bearing on it, but merely to assure that procedures exist to review decisions once information bearing on the decision has been corrected.

FERPA recognizes the responsibility of educational institutions and agencies to protect the privacy of students when they conduct or authorize data collection activities, but the DHEW regulations fail to specify any minimum requirements for such activities. A decision to conduct, assist, or authorize such activities may be influenced by a variety of factors, including professional interests and pressures on an institution to cooperate with various agencies of the Federal government or with a university that provides much of the continuing education for the school's teachers and administrators. Within large school systems, moreover, individual administrators in units of the system often have both *de facto* autonomy and strong incentives to authorize data collection activities. Chapter 15 recommends specific guidelines for institutional review of research and statistical activities in addition to requirements for notice and consent before research is carried out on captive populations such as students. The Commission feels that an educational institution should assume responsibility for protecting individuals from intrusive data collection whether or not the organization conducting the research does so. Educational institutions and agencies should not only assure that proposals for data gathering are centrally reviewed, but should also assume responsibility for assuring that research about an individual will not be carried out without his informed consent. Accordingly, the Commission recommends:

Recommendation (2):

That the Family Educational Rights and Privacy Act be amended to require an educational agency or institution to include in its institutional policy to implement FERPA reasonable procedures to protect against unwarranted intrusiveness and against unfairness in its education record-keeping practices including:

(a) reasonable procedures to prevent the collection and maintenance of inaccurate, misleading, or otherwise inappropriate education records;

- **(b)** **procedures that provide a student or parent a reasonable opportunity for reconsideration of an administrative decision regarding the student that is based in whole or in part on an education record about the student that has been corrected or amended as a result of rights exercised under FERPA subsequent to the decision; and**
- **(c)** **procedures to assure that except as specifically required by law, no survey or data collection activity will be conducted, assisted, or authorized by an educational agency or institution unless:**
  - **(i)** **the proposal for such an activity has been reviewed and approved by the educational agency or institution, and not a component thereof, to eliminate unwarranted intrusion on the privacy of students or their families; and**
  - **(ii)** **parents of affected students have been notified of such activity, provided a reasonable opportunity to review the collection materials, and allowed to refuse participation in such activity by their children or families.**

EXPANDING THE RECORDS AND INSTITUTIONS COVERED BY FERPA

Several significant areas of educational record keeping are currently beyond the purview of FERPA. The records and record-keeping practices of organizations that perform testing and data-assembly services for educational institutions are not subject to the Act. Nor does the Act protect an applicant for admission who does not subsequently matriculate. In addition, the waiver provision and the regulation that allows an institution to request such a waiver *[20 U.S.C. 1232g(a)(1)(B)* and *(C); 45 C.F.R. 99.12]* have effectively encouraged students to sign away their right of access to letters of recommendation which, although of debatable usefulness, are required in most admissions processes.

While testing and data-assembly services organizations have shown a sense of responsibility to individuals, and have incorporated many of the requirements of FERPA into their policies and practices, the individual has no legally assertible interest in records maintained by such organizations. That is, he has no way of assuring that policies adopted voluntarily will be followed. This is especially a problem where such policies prove costly, or where a testing and data-assembly organization comes under pressure from its clients to compile a record which, if compiled by the client, would be subject to FERPA. As the Commission has observed in other chapters of this report, a service organization that serves a number of clients engaging in the same type of activity (e.g., the Medical Information Bureau, which serves insurers, or the independent authorization services that support credit grantors) will attenuate the relationship between the primary record keeper (the insurer or credit grantor) and the individual unless it is subject to the same fairness and accountability requirements as the primary record keeper. Thus, the Commission recommends:

Recommendation (3):

That the Family Educational Rights and Privacy Act be amended to broaden the definition of an "educational agency or institution" to include organizations that provide testing or data-assembly services under contract to educational agencies or institutions or consortiums thereof, except that such organizations should not be subject to Section (b)(3) of the Act which requires educational institutions to permit access by Federal auditors to educational records without the consent of the student or his parent.

The Commission believes that the applicant who is not admitted to an educational institution has above all others an interest in securing correction or amendment of an education record, as well as reconsideration of a decision based on faulty or inappropriate information. It understands and sympathizes with the difficulties faced by an institution in making admissions decisions, and also realizes the temptation for a disappointed applicant to challenge a rejection on whatever grounds he can muster. The Commission is also aware, however, of the enormous importance of an admissions decision to an individual. It does not seek to eliminate human judgment from the decision process, nor does it believe that providing the FERPA protections to applicants will lead to that result. An admissions decision is necessarily a comparative judgment. While making records about applicants subject to FERPA would not lay bare the selection process, it would assure that an individual was being judged on the basis of accurate, timely, complete, and relevant information. Therefore, the Commission recommends:

Recommendation (4):

That the Family Education Rights and Privacy Act be amended to:

(a) broaden the definition of "student" to include an applicant for student status;

(b) make all provisions of FERPA applicable to education records pertaining directly to an applicant; and

(c) require that records created about an unsuccessful applicant be maintained by an educational agency or institution for 18 months from the close of the application process, after which time they must be destroyed.

FERPA specifically allows only waiver of the right of access to letters of recommendation. The DHEW regulations implementing FERPA provide, however, that any right recognized by FERPA may be waived, although they forbid an educational institution or agency to *require* a parent or student to waive a right. Although the whole concept of waiver is inconsistent with the spirit of FERPA, it was included for letters of recommendation at the urging of educators in post-secondary schools. As noted earlier, the Commission found no consensus about the value of letters of recommendation nor about the impact on their credibility of allowing students access to them. Nevertheless, preventing students from having access to letters of recommendation is somewhat of a *cause célèbre* for educators. Many regard such letters as private communications and thus keeping them confidential as a professional prerogative. Many faculty members who write letters of recommendation fear that student access might expose them to liability or retaliation. Many educational institutions fear that openness would make letters less candid. The evidence presented to the Commission does not support these arguments, but it does show that many institutions and faculty members feel strongly about the confidentiality of letters of recommendation.[38]

The Commission believes that evaluations are part of the professional responsibility of any educator, and that candid professional judgment should be sought and expected in letters of recommendation. Furthermore, analysis of case law indicates that evaluations of students communicated without malice in the course of official duties do not make an educator vulnerable to libel or slander.[39] Of course, any evaluation creates some risk of physical reprisal but the risk does not relieve the educator of his duty to render judgments about students.

The Commission believes, moreover, that candor is a professional obligation and should not carry the price of secrecy or potential unfairness. A student can, if he chooses, make an informal agreement with a professor that he will not exercise his right of access as the price for securing a letter of recommendation, but it is difficult to justify the formal blanket waiver of this right which institutions now solicit.

While it is difficult to argue against the individual's right to waive any of his rights, it is also difficult to conceive of ways to maintain the right to waive while assuring that it is exercised on a purely voluntary basis. The Commission does not wish to preclude any individual from choosing not to exercise his right to see a record, but it does wish to prevent him from forfeiting that right. Thus, the Commission recommends:

Recommendation (5):

That the Family Educational Rights and Privacy Act be amended to provide that the right of a student or his parent to inspect and review letters and statements of recommendation not be subject to waiver by the student or his parent, provided further, however, that letters and statements of recommendation solicited with a written assurance of

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[38] See, for example, Testimony of Ohio State University College of Law, Education Records Hearings, November 11, 1976, pp. 177-78; Testimony of National Association of State Universities and Land Grant Colleges, Education Records Hearings, November 11, 1976, p. 127; Testimony of Yale University, Education Records Hearings, November 11, 1976, p. 51; and Testimony of Franklin and Marshall College, Education Records Hearings, November 11, 1976, pp. 11-13.

[39] See, for example, *Blair v. Union Free School Dist.*, 67 Misc. 2d 248, 324 N.Y.S. 2d 222, (1971); *Everest v. McKenny*, 195 Mich. 649, 162 N.W. 277 (1917); *Morris v. Rousos*, 397 S.W. 2d 504, (Tex. Civ. App., 1965); *cert. denied*, 385 U.S. 868 (1965); *Morris v. Univ. Texas*, 352 S.W. 2d 947 (Tex. 1962), *cert. denied*, 371 U.S. 953 (1963); and *Morris v. Nowotny*, 323 S.W. 2d 301, (Tex. Civ. App. 1959), *cert. denied*, 385 U.S. 868 (1965).

confidentiality, or sent and retained with a documented understanding of confidentiality prior to the effective date of the statutory change not be subject to inspection and review by students or parents.

STRENGTHENING LOCAL ACCOUNTABILITY

The Commission has recommended that substantial responsibilities to protect individuals from unfairness in record keeping be levied on educational institutions. The Commission also believes that steps should be taken to strengthen an institution's incentive to live up to its responsibility, and that to make that happen, problems and abuses must be brought to the institution's attention.

As noted earlier, the size and degree of decentralization of educational institutions and agencies, and the many problems and responsibilities that compete for their time, attention, and resources, have meant that existing mechanisms for assuring accountability (e.g., parent or student involvement in governance, due process, administrative control procedures, and public governance structures) have not focused on record-keeping practices and their impact on the individual. FERPA allows substantial local discretion, but does not attempt to utilize fully existing local accountability mechanisms to enforce institutional responsibilities for fair record keeping.

The record-keeping policies and practices of an educational institution will not be effective unless they take into account the views and experience of students and parents as well as those of teachers and administrators. Protections for the individual depend on the development of good policies and practices because asserting interests on a case-by-case basis in remedy of specific abuses does not always provide the impetus for institutional change that will prevent future abuses. All of the mechanisms mentioned in the Commission's recommendations that appear below are now in place in most educational institutions. The Commission believes that the best way to assure that institutions respond effectively to the challenge of reforming their record-keeping practices is to focus the attention of these existing mechanisms for assuring accountability on record-keeping issues, so that public pressure will encourage the development of procedural standards. Accordingly, the Commission recommends:

Recommendation (6):

That the Family Educational Rights and Privacy Act be amended to require an educational agency or institution that conducts instructional programs to provide for parent or student participation in the establishment and review of its policies and practices implementing FERPA; and further

Recommendation (7):

That the Family Educational Rights and Privacy Act be amended to require an educational agency or institution that conducts instruction-

al programs to have procedures whereby parents or students may challenge its policies or practices implementing FERPA.

The Commission believes that the regulations implementing FERPA as amended pursuant to *Recommendations (6)* and *(7)* should require each agency or institution that conducts instructional programs[40] to establish procedures to hear and resolve complaints about FERPA policies or practices that (a) provide for the participation of parents or students; (b) require the agency or institution to state its reasons if it does not take any action to change its policy or practice in response to a complaint; (c) require the agency or institution to maintain a public record of the complaint and its disposition; and (d) provide for an appeal to the governing body of such agency or institution.

Further, the Commission recommends:

Recommendation (8):

That the Family Educational Rights and Privacy Act be amended to require that an educational agency or institution establish, promulgate, and enforce administrative sanctions for violations of its policy implementing FERPA. Such sanctions should be levied upon chief executive officers of educational agencies and components thereof who are negligent in pursuit of institutional compliance as well as upon employees who violate provisions of such policy.

THE FEDERAL ENFORCEMENT ROLE

Federal administrative agencies, even those with regulatory powers, cannot effectively correct each particular abuse, especially when the area being regulated is as large and decentralized as education. Even if FERPA provided a more effective sanction than the withdrawal of Federal funds, DHEW could not attempt to monitor each institution's performance or pursue each individual complaint. The Federal role should be much as DHEW currently interprets it to be—an instrument for assuring that educational agencies and institutions meet the minimum Federal requirements. The Commission believes that Federal administrative agencies should intervene if an institution's policies fail to comply with FERPA's requirements or when an institution systematically departs from its own policy. It is also convinced that to reserve DHEW as the court of last resort for complaints of systematic institutional failure to comply with FERPA is feasible, reasonable, and preferable to requiring Federal review and approval of each local policy. The Commission strongly approves of DHEW's current system of enforcement which, like compulsory arbitration, seeks to obtain voluntary compliance. It recognizes, however, that the Secretary of Health, Education, and Welfare needs a more credible and flexible sanction to make these efforts to secure voluntary compliance effective. Hence, the Commission recommends:

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[40] The Commission feels that administrative services organizations should be exempt from this requirement.

Recommendation (9):

> **That the Family Educational Rights and Privacy Act be amended to provide that all or any portion of DHEW funds earmarked for education purposes may be withheld from an educational agency or institution when its policy does not comply with FERPA requirements or when evidence of systematic failure on its part to implement its policy is presented to the Department of Health, Education, and Welfare. Such withholding of funds should only be imposed if the Secretary has determined that compliance cannot be secured through voluntary means or that systematic failures to implement policy have previously been brought to the attention of the educational agency or institution and it has not taken sufficient steps to correct such failures. The amount withheld should be appropriate to the nature of the violation, and should provide incentives for future compliance.**

An individual needs some further remedy when, because of inertia, inefficiency, recalcitrance, or ignorance on the part of school officials at the operating level, a school or other component of a large and decentralized educational system refuses to permit him to exercise his FERPA rights. None of the Commission's recommendations so far outlined provide, individually or collectively, such a remedy. Civil action can provide timely relief, and the threat of it increases the incentive for institutions to be responsive. Such civil action, however, should be corrective rather than punitive, and thus limited to assuring that institutions accord individuals their FERPA rights. Therefore, the Commission recommends:

Recommendation (10):

> **That the Family Educational Rights and Privacy Act be amended to permit an individual (in the case of a minor, his parents or guardian) to commence a civil action on his behalf to seek injuctive relief against an educational agency or institution that fails to provide him with a right granted him by FERPA. The district courts should have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to order an educational agency or institution to perform such act or duty as may be required by FERPA and to grant costs of the litigation, including reasonable attorney's fees.**

INCREASING LOCAL DISCRETION

The section of this chapter that describes problems in educational record keeping under FERPA cites a number of examples of where FERPA is prescriptive rather than permissive insofar as the exercise of local discretion is concerned. The examples cited involved the conflicting interests of the individual in the use of desk drawer notes in diagnostic and treatment situations; the conflict between privacy and freedom of information in the matter of directory information; the tension between individual protections and societal benefits in research; and the school's relationship with other societal agencies that share responsibility for the child's welfare and the rights of the individual.

In the Commission's judgment, FERPA's attempts to prescribe the proper balance in these situations have created more problems than they solve. Thus, the final set of Commission recommendations seeks ways of giving educational institutions more responsibility for striking the balance. The Commission believes that the accountability mechanisms called for in *Recommendations (6), (7), (8), (9),* and *(10)* will assure that the responsibility is not abused.

Desk Drawer Notes. FERPA provides that a student or his parents may have access to an educator's desk drawer notes about the student only if the educator shares information from them with someone other than a substitute. This restriction may often be harmful to a student and may reduce the effectiveness of the educational program. The provision tries to resolve two real concerns about the sharing of such information: (1) the possible stigmatization of an individual by information whose nature and quality are not subject to institutional control; and (2) the possibility that desk drawer notes will be hidden from parents and students but used in institutional decision making. The latter problem can be solved by giving an individual access to all the data used in making administrative decisions about him, and recourse if those data are erroneous or incomplete. Since desk drawer notes serve primarily as a memory aid to assist in diagnosing the problems of a child and as such have only a temporary value, the threat of stigmatization can be alleviated by arranging for the destruction of desk drawer notes at the end of each regular academic reporting period, unless they are incorporated into the official record system of the educational institution. Sharing information in desk drawer notes during that period is unlikely to result in stigmatizing an individual. If such information is so difficult for an educator to remember that it must be written down, one might fairly assume that it will be forgotten quickly. If some particular bit of information in a desk drawer note is significant enough to stigmatize an individual, then it will probably be remembered and shared with others whether or not it is recorded. Indeed, desk drawer notes seem to have sufficient educational value to argue for their improvement; not for their abolition. The dangers inherent in maintaining them can be controlled by routinely destroying them or by exposing them to the same access and correction rules to which other education records are subject. Therefore, the Commission recommends:

Recommendation (11):

That the Family Educational Rights and Privacy Act be amended to make it permissible for records of instructional, supervisory, and administrative personnel of an educational agency or institution, and educational personnel ancillary thereto, which records are in the sole

possession of the maker thereof, to be disclosed to any school official who has been determined by the agency or institution to have legitimate educational interests in the records, without being subject to the access provision of FERPA, provided, however:

(a) that such records are incorporated into education records of the agency or institution or destroyed after each regular academic reporting period;
(b) that such records are made available for inspection and review by a student or parent if they are used or reviewed in making any administrative decision affecting the student; and
(c) that all such records of administrative officers with disciplinary responsibilities are made available to parents or students when any disciplinary decision is made by that officer.

Directory Information. The purpose of establishing an exemption for the disclosure of directory information was to let institutions create a category of information about students that is freely available to the public. FERPA requires that categories of directory information be defined in an institution's FERPA policy and that students and parents be informed of what information the categories include. Given the mechanisms to assure accountability recommended by the Commission, it is highly unlikely that an institution would characterize any information as directory information whose disclosure might cause harm or embarrassment to an individual. Because the administrative burden and the cost of permitting students to specify that some or all directory information about them may not be released is substantial, and because the only information normally characterized as directory information that is likely to create problems for the student if disclosed is information that serves to locate him, the Commission recommends:

Recommendation (12):

That the Family Educational Rights and Privacy Act be amended to provide that insofar as directory information is concerned, a student or parent may only require that address and phone number not be published without his consent or that it only be disclosed to persons who have established to the satisfaction of the institution a legitimate need to know.

Disclosures for Research and Statistical Purposes. The Commission believes that its recommendations regarding the disclosure of administrative records for research or statistical purposes in Chapter 15 should apply equally to education records. Adoption of the Commission's recommendations on research and statistics would allow educational institutions to permit the use of administrative records for any legitimate research or statistical purpose, but would, at the same time, make it easier for them to resist requests which they consider unwarranted. It would also give them more control over the conditions of disclosure, because the research organization seeking administrative records would have to sign a written agreement accepting the conditions stipulated by the educational institution. The Commission also believes that the decision to disclose records for research and the stipulation of the conditions under which they will be disclosed should be made by a central authority in an educational institution or agency and not a component thereof. Therefore, the Commission recommends:

Recommendation (13):

That the Family Educational Rights and Privacy Act be amended to permit an educational agency or institution to use or disclose an education record or information contained therein in individually identifiable form for a research or statistical purpose without parent or student consent, provided that the agency or institution:

(a) determines that such use or disclosure in individually identifiable form does not violate any conditions under which the information was collected;

(b) ascertains that such use or disclosure in individually identifiable form is necessary to accomplish the research or statistical purpose for which the use or disclosure is to be made;

(c) determines that the research or statistical purpose for which any use or disclosure is to be made warrants the risk to the individual from additional exposure of the record or information;

(d) requires that adequate safeguards to protect the record or information from unauthorized disclosure be established and maintained by the user or recipient, including a program for removal or destruction of identifiers;

(e) prohibits any further use or redisclosure of the record or information in individually identifiable form without its express authorization;

(f) prohibits any individually identifiable information resulting from such research from being used to make any decision or take any action directly affecting the individual to whom it pertains;

(g) makes any disclosure pursuant to a written agreement with the proposed recipient which attests to all of the above;

and provided further, that all such determinations, requirements, and prohibitions are made by the educational agency or institution (and not a component thereof).

Disclosures to Social Services Agencies. While the Commission understands the importance of the free flow of information between educational institutions and agencies and other social services agencies, it is also concerned that education records not become a source of information for purposes that are not acceptable to the individuals to whom they pertain. The achievement of educational goals, however, often depends upon ancillary services provided by other institutions, and the Commission believes that an educational agency should get all the help possible in meeting the needs of its students. The Commission's recommendations stress the need for participation by students, parents, and the public in the development of FERPA policies, vesting responsibility for record keeping in an educational institution's central authority rather than in components of the institution, and using a variety of mechanisms to assure that parent and student rights are protected. Given such protections, the Commission believes that educational institutions should be permitted to make determinations regarding whether certain routine disclosures of information are necessary for the educational agency to accomplish its own mission, and thus what disclosures should be permitted without the consent of students or parents. The burden should be on the educational institution to demonstrate the educational purpose of such disclosures, and the policy should be specific as to the agencies and types of information involved in such disclosure. The Commission, therefore, recommends:

Recommendation (14):

> **That the Family Educational Rights and Privacy Act be amended so as to permit an educational agency or institution to designate in its policy implementing FERPA that disclosures may be made on a routine basis without the authorization of the parent or student to a particular welfare or social service agency for a specified purpose that directly assists the educational agency or institution in achieving its mission, provided that the categories of information which may be disclosed to such agency are also specified and that further redisclosure by such agency is prohibited.**

Disclosure to Law Enforcement Units. Current FERPA requirements make it difficult for an educational institution to deal with both its own law enforcement unit, if it has one, and with local law enforcement agencies. In the first case, if an educational institution discloses student records to its own law enforcement unit, *all* records of that unit become subject to FERPA. In the second case, while restricting disclosures of student records to local law enforcement agencies is laudable in most instances, it creates a problem when the educational institution is a party of interest in a criminal investigation or when disciplinary problems and delinquency problems involving violations of law are difficult to differentiate. The Commission believes this problem demands a three-part resolution: (a) assuring that a parent or student has access to any recorded information used to make any disciplinary decision about the student; (b) holding an educational institution responsible for the quality of the information it uses to make disciplinary decisions about students or discloses to third parties that will make such decisions; and (c) assuring that an educational institution is in a position to get the help it needs from both its own law enforcement unit and local law enforcement units to protect the safety of employees or students and the property of the schools and individuals.

The measures thus far recommended by the Commission, if adopted, would guarantee that students and parents have the right to see and challenge all records of disciplinary officials, including desk drawer notes, when a disciplinary decision is made about a student. They would also require educational institutions to have reasonable procedures to assure the accuracy, timeliness, completeness, and relevance of such records for educational purposes, and mechanisms to force continual review of the adequacy of such procedures. Given these recommended protections, the Commission sees no reason to recommend that an educational institution have less latitude to exchange information with its own security or law enforcement unit than it does to make disclosures to law enforcement units outside the educational institution. Therefore, the Commission believes that a law enforcement unit of an educational institution should be allowed to exchange information with the rest of the educational institution without making its law enforcement records subject to FERPA. At the same time, educational institutions should be able to share education records, including disciplinary records, with their law enforcement unit only to the same extent as they can share such records with other law enforcement agencies.

Current FERPA requirements prohibit disclosure of education records to law enforcement agencies without parent or student consent, except under judicial order with advance notice to the parent, or in an emergency when such disclosure is necessary to protect the health or safety of the student of other persons. In effect, this prevents educational institutions from sharing information legally with law enforcement units in cases where the safety and welfare of students, faculty, and school property are involved. The emergency exception does not permit routine cooperation with law enforcement agencies even when the educational institution may be a party of interest. The DHEW regulations make this clear by including as one criterion of an emergency, that time be of the essence, and by stressing that the emergency clause is to be construed strictly. In many urban and suburban schools, however, there are extortion rings, gang violence, theft rings, hard drug traffic, and other continuing criminal activities. While education records are seldom vital to the conduct of a criminal investigation, they can sometimes be extremely helpful. It is the Commission's judgment that educational institutions should be allowed to make the determination that a disclosure is necessary as long as it is publicly accountable for its decision.

Therefore, the Commission recommends:

Recommendation (15):

That the Family Educational Rights and Privacy Act be amended to provide:

(a) that records collected or maintained by the security or law enforcement branch of an educational agency or institution solely for a law enforcement purpose—

  (i) shall not be considered to be education records subject to the provisions of FERPA when the security or law enforcement branch does not have access to education records maintained by the agency or institution; and

- **(ii) may be disclosed only to law enforcement agencies of the same jurisdiction and to school officials responsible for disciplinary matters;**

(b) that disclosure of information may be made by an educational agency or institution to law enforcement officials without the consent of the student or parent, provided that:

- **(i) an official determination is made by the educational agency or institution (and not by a component thereof) that the information disclosed is necessary to an authorized investigation of ongoing violations of law which threaten the welfare of the educational agency or institution or its students or faculty; and**
- **(ii) each determination is publicly reported to the governing board of the agency or institution including the type of information disclosed, the number of individuals involved, and the justification for such disclosure, but not the names of the individuals involved.**

* * * * * * *

The Commission believes that its recommendations will strengthen the protections afforded parents and students by the Family Educational Rights and Privacy Act and will give localities greater latitude in formulating FERPA policies that meet their particular needs and circumstances. The Commission also feels that the Department of Health, Education, and Welfare should provide substantial technical assistance to educational institutions to facilitate and expedite the development and implementation of such policies. Federal assistance might take the form of grants to consortiums of schools to develop and promulgate model policies, public information projects to inform schools, parents and students of their rights and responsibilities, and projects to identify and disseminate information about model practices. DHEW's experience with FERPA places it in a unique position to provide or sponsor such assistance.

Appendix 4

CLAREMONT
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COLLEGE
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Coeducational 1976

Office of Admission and Financial Aid • Pitzer Hall, Claremont, California 91711 • Telephone 714-626-8511, Ext. 3833

HARVEY MUDD
COLLEGE
Founded 1955
Coeducational 1957

August 2, 1977

The House Subcommittee on Elementary,
Secondary and Vocational Education
Room B-346C
Rayburn House Office Building
Washington, D. C. 20515

Dear Sirs:

The Chronicle for July 18 says that the Privacy Protection Study Commission is recommending among other things, that legislation be passed:

> "To broaden the definition of 'student' to include an applicant for student status," to make all provisions of the Buckley Amendment applicable to educational records pertaining directly to the applicant," and "to provide that the right of a student for his parents to inspect and review letters and statements of recommendation not be subject to waiver by the student or his parent..."

If I understand this, we would not be able to guarantee the confidentiality of any recommendation received from a school person in behalf of a candidate for admission. Neither the promise to destroy a recommendation before the applicant becomes a student nor a student waiver will keep such reports private.

The Buckley Amendment was a disservice to applicants for admission.

Suppose a candidate has serious psychiatric problems. If the parents discover that such information has been sent to a college, they may create difficulties for the counselor who reported it. On the other hand, if the college, lacking this information, admits the student, he may break down trying to meet the heavy demands of college. (I have seen this happen.)

Or suppose a candidate has a problem or eccentricity not serious enough to warrant his rejection for admission but a handicap to his success in college. If the threat of trouble from parents prevents a counselor from reporting this information, the college will be unprepared to aid the student when he arrives. (I have seen this, too.)

The House Subcommittee on Elementary,
Secondary and Vocational Education
August 2, 1977
Page 2

Knowing these things, conscientious admission officers and high school counselors found ways to maintain a relationship that guaranteed the confidentiality of recommendations of students. This new regulation would destroy that relationship, and many students will suffer or fail in college as a result.

The Commission also recommends legislation:

> "To require that records created about an unsuccessful applicant be maintained by an educational institution for 18 months from the close of the application process, after which they must be destroyed."

If I understand this, we will have to destroy within 18 months of March 1 (our application deadline) the credentials of any candidates who do not enter. This would be before the beginning of what would have been their sophomore year.

In our operation we keep for four years the credentials of all candidates who do not enter. Then any who decide later they would like to reapply do not have to provide us again with credentials we already have.

A number of our candidates every year are saved considerable inconvenience as a result. For example, students who go to community colleges for a year or two and who then reapply need only provide us with community college transcripts and recommendations. I am at a loss to understand any purpose served by this measure.

I urge that both regulations be opposed.

Sincerely,

Emery R. Walker, Jr.
Dean of Admission

ERW:edy

AMERICAN ASSOCIATION of COLLEGIATE REGISTRARS and ADMISSIONS OFFICERS
One Dupont Circle, N.W. • Washington, D. C. 20036 • (202) 293-9161

August 1, 1977

The Honorable Carl D. Perkins, Chairman
Subcommittee on Elementary, Secondary and
Vocational Education
Committee on Education and Labor
House of Representatives
Washington, D.C. 20515

Dear Mr. Perkins:

This letter is forwarded on behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) to express concern over the several recommendations which have been submitted to the Congress and to the President by the Privacy Protection Study Commission. AACRAO represents over 2,000 accredited institutions of higher learning which involves over 6,500 individual members who are Registrars and Admissions Officers. These officials have the main responsibility for implementing FERPA (the Buckley Amendment).

General Comments:

We are generally concerned and perplexed over the oscillating control already established by the Buckley Amendment. On one hand it protects the privacy of students and parents through maintaining the confidentiality of student education records by disallowing individuals (such as employers, certain school officials, and sometimes even parents) access to the education records without the students' consent. On the other hand the present law grants selected Federal, State, and local officials access without consent of the students.

We are also generally concerned over several of the recommendations which will further impact on institutional procedures by requiring additional detailed and time-consuming procedures. We have reason to conclude from information gathered when we, in cooperation with seven other national educational associations, published a Guide to implement the Buckley Amendment, that a vast majority of accredited institutions already are accomplishing the same intended results without having to alter their procedures through the stigma of additional Federally imposed legislation.

Specific Comments:

We are basically concerned over Recommendation (10) of the Privacy Commission if it is enacted into law, because it counteracts authority granted the Administrator of Veterans Affairs in PL 94-502, Title IV, Chapter 36, Section 510, Section 1790(c), Title 38, United States Code which contains the following wording:

> "(c) Notwithstanding any other provision of law, the records and accounts of educational institutions pertaining to eligible veterans or eligible persons who received educational assistance under this chapter or chapter 31, 32, 34, or 35 of this title,

Continued . . .

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> as well as the records of other students which the Administrator determines necessary to ascertain institutional compliance with the requirements of such chapters, shall be available for examination by duly authorized representatives of the Government."

Senate Report 94-1243, 94th Congress, 2nd Session, dated September 16, 1976 of the Committee on Veterans' Affairs, pages 131-133, spells out in detail the types of and what records and files of both veterans and non veterans will be made available to the VA. In spite of this provision of law, Recommendation (10) of the Privacy Commission would permit an individual to commence a civil action on his behalf to seek injunctive relief against an educational agency or institution that fails to provide him with a right granted by FERPA and cause an institution to grant costs of the litigation, including reasonable attorney's fees.

We submit that if Recommendation (10) becomes law, the conflict between its provisions and that of Section 1790(c) mentioned above, place institutions of higher learning, their Registrars and Admissions Officers, and other interested college and university officials in an untenable position if either veteran or non veteran educational records are divulged to the VA, without consent of the students/parents.

Sincerely,

J. Douglas Conner
Executive Secretary

JDC:ew--

AUC

nassp The National Association of Secondary School Principals
1904 Association Drive • Reston, Virginia 22091 • Tel: 703-860-0200

OWEN B. KIERNAN
Executive Director

August 2, 1977

The Honorable Carl D. Perkins
Chairman
Committee on Education and Labor
House of Representatives
Washington, D.C. 20515

Dear Chairman Perkins:

In your review of the Family Education Rights and Privacy Act (FERPA) we would like to advise you of certain concerns shared by many of our members.

As the attached letter to the Privacy Protection Study Commission indicates, the NASSP has not opposed FERPA or the general intent that motivated it. As we further indicated in our letter, after suitable amendment and regulatory clarification, we believe FERPA has been able to be applied without imposing undue hardships upon teachers or administrators.

We are concerned, however, at some of the recommendations which the Privacy Protection Study Commission is now making to Congress for increasing the requirements of FERPA still further.

Of greatest concern is the Commission's recommendation that every educational agency or institution formulate, adopt, and promulgate an "affirmative action" policy to implement the privacy requirements, upon penalty of losing federal education funds. This suggestion is apparently based on the Commission's belief that many students and their parents are not sufficiently concerned with their rights under FERPA and should be advised by the schools themselves to take greater advantage of their rights under it.

We would submit that this is the worst kind of example of make-work for already hard-pressed school administrators that we have seen. The existing law requires that all students be advised of their rights under FERPA. If they or their parents are still insufficiently concerned to exercise them, there would seem to be no justification in requiring school districts to exhort them to do so.

This is particularly true in connection with FERPA, which does not concern the rights of any minority, or other group identifiable as the object of discrimination. In addition, as pointed out by the former President of Yale University, and now Ambassador to Great Britain, Kingman Brewster, FERPA already goes beyond any other federal law in seeking to regulate local school matters totally unrelated to any federal aid program. We believe further extension of this law should not be undertaken without great caution.

Serving *all* Administrators in Secondary Education

The Commission further recommends that FERPA be amended to specifically authorize the filing of civil suits for injunctive relief against any educational institution that fails to provide and protect the rights guaranteed in the law. Federal district courts would be further empowered to grant the student or parent bringing such actions the costs of litigation, including attorney fees.

We can only assume that someone has grossly misled the Commission as to the degree of abuse of FERPA in the year since final regulations have been in effect. The very fact that an affirmative action policy is also recommended would, in itself, suggest that the number of persons believing themselves abused must be a small one. Indeed, in the brief time during which the law has been in effect, there would hardly seem to have been time to judge whether the remedies already provided in the law are so insufficient as to justify further serious penalties. From information coming from our own members and from the HEW we know of nothing to warrant this further effort to penalize school districts and administrators for possible violations of FERPA. Finally, it should be noted that this kind of effort to create new causes of action in the federal courts merely exacerbates the overcrowding of the court dockets deplored by judicial authorities.

Lastly, we believe the Commission's recommendations for broadening the scope of the law to apply to applicants for student status, as well as enrolled students, and requiring schools to maintain records of such applicants for 18 months from the close of the admissions process, is misguided. In our view, this attempt to protect persons seeking admission to schools and colleges totally ignores the societal need for candid expressions of opinion about the abilities and character of applicants for college or other specialized training.

In cases where specific cause exists, legal process is already available for discovery of material which may be libelous or otherwise injurious to reputation. To use a federal statute to satisfy the curiosity of every unsuccessful applicant, and in that course to destroy the student selection process, would be totally irresponsible.

We sincerely hope that our comments on this important matter will be given serious consideration.

Yours very sincerely,

Executive Director

OBGK;ag

NATIONAL CONGRESS OF PARENTS AND TEACHERS

Office of the President

700 North Rush Street
Chicago, Illinois 60611
(312) 787-0977

August 16, 1977

The Honorable Carl D. Perkins, Chairman
Committee on Education and Labor
Subcommittee on Elementary, Secondary
and Vocational Education
U.S. House of Representatives
B-346C Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Perkins:

Thank you for your letter of August 9. The National Congress of Parents and Teachers is pleased to have this opportunity to respond to the Committee's efforts to assess the Buckley Family Educational Rights and Privacy law, which is now three years old. We are presently studying the extensive report of the Privacy Protection Study Commission, which has only recently been made available to us; however, we are pleased to make some initial comments at this time and to enlarge upon them at a later date.

In regard to the suggested changes in "directory information," we believe that the proposals are a practical response to the clash between the rights of a parent or student and the administrative burden of the school. As long as the parent or student may ask that the data not be published without his consent, and that the data be disclosed only to those persons who establish their "need to know," we are of the opinion that the rights of both parties are secured.

We are concerned, and were initially, with the ease with which youngsters or their parents may waive their rights to inspect or review letters of recommendations. Parents and students are under great pressure from institutions of higher learning to waive these rights in order to permit traditional methods of selection and elimination. That process does not always serve the best interests of the student and we agree with the Commission's recommendations that such waivers should not be acceptable.

We agree that the educational institution should be required to adopt an affirmative policy to implement the policy, and this deals with our major concern that many school districts have not taken seriously their obligations to notify parents and students of their rights under this law to inspect, correct, and challenge data, and to appeal findings. Some schools notify parents in such a brief or obscure way, so as to make the law's provisions useless to the average parent. An affirmative local policy would help to correct this.

The Honorable Carl D. Perkins
August 16, 1977
Page Two

We do believe that the law has done much to help reduce access to student files by unauthorized persons, and has served as a consciousness-raising for both school officials and parents as to the need to protect privacy of information. With well-defined procedures by the schools, the law should prevent unnecessary collection and maintenance of misleading and inappropriate education records. In general, we are satisfied that more good than harm has come from three years' experience with the law, and hope that some "fine-tuning" of the provisions will further increase its effectiveness.

Sincerely,

Grace Baisinger

Mrs. Grace Baisinger
President

GB:an

STATE OF KANSAS

OFFICE OF THE GOVERNOR
State Capitol
Topeka

ROBERT F. BENNETT
Governor

August 31, 1977

Mr. Carl Perkins
Chairman
Subcommittee on Elementary, Secondary
and Vocational Education
Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am Chairman of the Education Commission of the States National Advisory Committee on Child Abuse and Neglect which advises the Education Commission of the States' Child Abuse and Neglect Project. The purpose of the project is to offer alternatives to state legislators and education leaders on how they may improve services to abused or neglected children in their states. We understand that your Committee held hearings on August 2 concerning the Privacy Protection Study Commission's recommendations on the Family Educational Rights and Privacy Act (FERPA), of 1975.

Since the passage of FERPA we have been very concerned about its effect on the reporting of child abuse and neglect incidents. An issue had been raised as to whether or not educational personnel who reported child abuse incidents as required by the state reporting statutes would jeopardize the school district's federal funding by having violated FERPA if they did not obtain prior parental consent. We examined the statute and concluded that several of the exemptions under Section 438(b) allowed for reporting as required by the statutes and did not jeopardize school district funding. We brought our analysis of the issue to the attention of the Secretary of HEW and Mr. Thomas McFee, then Deputy Assistant Secretary for Administration and Management, who concurred with the basic thrust of our analysis. A copy of our May 16 letter to the Secretary and his response is enclosed for your information. Therefore, we believe this issue has been favorably settled for educational personnel and for those concerned with detecting and aiding abused and neglected children. Additionally, in practice, to our knowledge, there have not been any problems with respect to reporting or liability.

Unfortunately, the Privacy Protection Study Commission, in its examination of FERPA, misinterpreted the relationship of the exemptions to disclosure to social service agencies under reporting statutes. Based on this interpretation of the Act they have set forth recommendations which were discussed in your hearings August 2. We are concerned with recommendation 14 which states:

> "That the Family Educational Rights and Privacy Act be amended so as to permit an education agency or institution to designate in its policy implementing FERPA that disclosures may be made on a routine basis without the authorization of the parent or student to a particular welfare or social service agency for a specified purpose that directly assists the educational agency or institution in achieving its mission, provided that the categories of information which may be disclosed to such agency are also specified and that further redisclosure by such agency is prohibited."

We have expressed our concern to Mr. David Linowes, Chairman of the Commission. We do not feel that the problem he outlined exists, given our previous correspondence with HEW and the widespread discussion of the issue within the community of those concerned about child abuse and neglect. A copy of my letter of today, August 31, 1977, to Mr. Linowes is enclosed for your reference.

Additionally, the recommendation would cause further confusion and may result in limiting existing reporting statutes. First, under FERPA as it is presently written it requires uniform application and administration. Hence, there is no variance among education agencies in determining what information may be disclosed and to which social agencies. The Commission recommendation may be interpreted to allow each agency to create its own policy. Secondly, if information is to be released only if it serves a specific educational purpose, then such an amendment may act as a limitation on disclosure.

There is, however, one aspect of the statute which continues to pose a problem in some states. Section 438(b) (1) (E) does not require prior parental consent to release information required to be disclosed to state and local authorities under state statutes passed before November 19, 1974. Since the passage of FERPA, approximately 35 states have amended their child abuse and reporting statutes. These amendments have included expanding the categories of personnel who must report suspected cases of child abuse and neglect. Five of these states have amended their statutes to include educational personnel within the category of state and local officials who must report suspected cases of child abuse and neglect. These five states are Maine, Minnesota, Mississippi, North Dakota, and South Dakota. Since these amendments took place after the November 19, 1974 deadline this exemption as a justification for disclosure under FERPA does not apply to those states. Education personnel must rely on other sections of the statute to disclose child abuse and neglect incidents. In order to clarify any confusion with respect to justifying reporting by educational personnel, we recommend that the November 19, 1974 date be deleted.

I have enclosed a copy of a report from the Child Abuse Project "Trends in Child Abuse and Reporting Statutes" to give you a fuller feel of the movement within the states in these areas. If you desire further information on this subject, please feel free to contact either C. D. Jones, Director or Phil Fox, Assistant Director of the Child Abuse and Neglect Project in Denver.

Sincerely yours,

Robert F. Bennett
Governor of Kansas
Chairman, ECS Advisory Committee on Child Abuse & Neglect

RFB/jw

Enclosures: Letter of May 17, 1976 to Secretary Matthews
Letter of June 16, 1976 from Secretary Matthews
Letter of June 30, 1976 from Tom McFee
Letter of August 31, 1977 to David Linowes
Report No. 95

STATE OF KANSAS

OFFICE OF THE GOVERNOR
State Capitol
Topeka

ROBERT F. BENNETT
Governor

May 17, 1976

Honorable David Mathews, Secretary
Department of Health, Education & Welfare
400 Independence S.E.
Washington, D.C. 20201

Dear Secretary Matthews:

I am Chairman of the Education Commission of the States' National Advisory Committee on Child Abuse and Neglect which advises the Education Commission of the States' Child Abuse and Neglect Project. The purpose of the project is to offer alternatives to state legislators and education leaders on how they may improve services to abused or neglected children in their states. We understand you are reviewing the Regulations for the Family Educational Rights and Privacy Act of 1974 (Buckley Amendment) for final publication.

Mr. David L. Herbert, in the August 1975 issue of Juvenile Justice, has raised an issue which is causing great concern within the child abuse community. In reviewing the Buckley Amendment, Mr. Herbert states that teachers who report cases of child abuse without parental consent, as required under the Act, will thereby violate the Act and jeopardize their schools' Federal funding. We have reviewed the Act and the proposed Regulations and feel that this is an incorrect interpretation.

We believe three sections of the Act support this interpretation. In his article, Mr. Herbert refers to section 438(b)(1)(A-D). He overlooked, however, subparagraph E which states that records may be released without parental consent to:

> "State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974."

The previously proposed regulations adopted this language verbatim. We interpret this to mean that state child abuse statutes which require reporting of suspected child abuse cases are covered by this subparagraph. Therefore, under such statutes, when teachers are required to report such cases, they are exempt from liability.

According to the Child Abuse and Neglect Project's Report No. 84, approximately 23 states passed reporting statutes prior to November 19, 1974, and would be clearly covered by subparagraph E. However, approximately 27 states have either passed reporting statutes since that time or have amended existing statutes to include mandatory reporting. In the case of those states which have amended pre-existing statutes, it would be advantageous to use the date of the original state statute for purposes of the Buckley Amendment so that they would be considered as adopted prior to November 19, 1974. For those states which have adopted reporting statutes subsequent to the effective date, subparagraph I would cover reported cases.

Section 438(b)(1)(I) would further exempt teachers from obtaining parental consent and therefore exempt them from liability. This subparagraph states that parental consent is not required for release of records to appropriate persons if such knowledge is necessary to protect the health or safety of the student. The final Regulations published on March 2 outline several factors to be taken into account in determining whether or not to release the information. They are:

1. The seriousness of the threat to the health or safety of the student or other individuals;

2. The need for the information to meet the emergency;

3. Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

4. The extent to which time is of the essence in dealing with the emergency.

Finally, section 438(a)(4)(A) and (B) define the term educational records. Subparagraph B states that if law enforcement personnel do not have access to educational records under subsection (b)(1) (which includes subparagraphs E and I mentioned above), then the records of the law enforcement unit which are (1) kept apart from other records (2) maintained solely for law enforcement purposes and (3) made available only to law enforcement personnel, are exempt from the definition. Hence, child abuse reports may not be considered educational records depending on state procedures for classifying such records.

We would appreciate your consideration of this issue of concern to state child abuse and neglect authorities. The question of liability for reporting should be specifically addressed in the final Regulations. Report No. 84 is enclosed for your reference. The committee and staff of the Child Abuse and Neglect Project stand ready to provide you with any further information you may desire.

Sincerely,

Robert F. Bennett
Governor of Kansas
Chairman, ECS Advisory Committee
on Child Abuse and Neglect

RFB:jps

Enclosures: Report No 84
Mr. Herbe[illegible]'s article from Juvenile Justice

cc: Douglas Besharov
Director
National Center on Child Abuse and Neglect

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D.C. 20201

JUN 16 1976

The Honorable Robert F. Bennett
Governor of Kansas
Topeka, Kansas 66612

Dear Governor Bennett:

Thank you for your letter of May 17 regarding the Family Educational Rights and Privacy Act of 1974.

Mr. Thomas S. McFee, the official responsible for administering the Act, informs me that he is in general agreement with you as to the effects, or lack thereof, of the Act on child abuse and neglect reporting. He further advises me that a member of his staff has discussed the apparent shortcomings of the Juvenile Justice article with its author, Mr. David L. Herbert, and the staff of the National Center on Child Abuse and Neglect.

I appreciate your concern over this matter and have asked Mr. McFee to respond directly with respect to the analysis contained in your letter.

Cordially,

David Mathews

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

June 30, 1976

The Honorable Robert F. Bennett
Governor of Kansas
Topeka, Kansas 66612

Dear Governor Bennett:

This is in further response to your letter of May 17 regarding the impact of the Family Educational Rights and Privacy Act of 1974 (FERPA) on the reporting of suspected instances of child abuse and neglect.

As the Secretary mentioned in his June 16 response, a member of my staff has discussed the shortcomings of the Juvenile Justice article with its author, Mr. D. L. Herbert, and the staff of the National Center on Child Abuse and Neglect. They were advised that, inasmuch as FERPA governs only access to and disclosure from educational records, it is important to distinguish between reports emanating from educational records and those based solely on personal observation. The latter category is not affected by the Act.

If, however, the report is based on information obtained from school records, its disclosure would be affected by FERPA. There are, of course, provisions of the Act pursuant to which information may be disclosed without first obtaining the generally required written parental consent. Your letter discusses two of these provisions, 438(b)(1)(E) and (1). While I am in general agreement with your analysis of these provisions, I am inclined to believe that your proposal to use as the effective date of a statute the date of its original enactment, rather than the post November 19, 1974 date on which it may have been amended, would not be consistent with the intent of Congress. However, legal advice should be sought at the State level in order to determine whether a given amendment is so basic as to have destroyed the nexus with the original (effective date of the) statute.

Your conclusion, based on a reading of sections 438(a)(4)(A) and (B) which define the term educational records, that child abuse reports may not be educational records depending on State procedures for classifying such records appears to be accurate. However, a careful analysis of the conditions set forth in 438(a)(4)(B) indicate that to have relevance in alleviating reporting restrictions, teachers (or those doing the reporting) would have to be considered law enforcement personnel. In the end, the real "gain" would be that parents could be denied access to any copy of the report retained by the school. This "gain" would be offset by the need to maintain such reports separate from other records and to meet the other conditions of that section.

Lastly, I regret to advise you that the issue of liability for child abuse reporting was not directly addressed in the FERPA final regulation published June 17 (copy attached). In light of this omission, I would be interested in your views as to the most likely vehicles to be of use in clarifying the situation.

Sincerely,

Thomas S. McFee

Thomas S. McFee
Deputy Assistant Secretary for
Management Planning and Technology

Attachment

STATE OF KANSAS

OFFICE OF THE GOVERNOR
State Capitol
Topeka

ROBERT F BENNETT
Governor

August 31, 1977

Mr. David F. Linowes
Chairman
Privacy Protection Study Commission
Suite 424
2120 L Street, N.W.
Washington, D.C. 20506

Dear Mr. Linowes:

I am Chairman of the National Advisory Committee on Child Abuse and Neglect of the Education Commission of the States project on Child Abuse and Neglect. The purpose of the project is to offer alternatives to state legislators and education leaders on how they may improve services to abused or neglected children in their states. We have reviewed a draft copy of the Commission's recommendations concerning the Family Educational Rights and Privacy Act of 1975, (FERPA), referred to as the Buckley Amendment. The interpretation of the statute and the recommendations are of concern to those of us who have previously addressed the effect of FERPA on state child abuse and neglect reporting statutes and requirements.

The general discussion of FERPA states:

> "There are other examples of inflexible disclosure rules in FERPA that work to the disadvantage of the student, the school, or other institutions, or all three. For example, the relationship of schools with social service agencies varies from community to community. FERPA, however, does not take account of these different working relationships. It dictates one inflexible rule regarding disclosure -- that school records may not be disclosed to social service agencies without student or parent consent. FERPA leaves no flexibility for sharing any information about students with any social service agency for any purpose except in connection with a financial aid program. For example, under a strict interpretation of FERPA, schools cannot assist local services agencies that are providing clothing to needy children by giving them information to identify potential candidates. Nor can schools report cases of

possible child neglect to local services agencies without parental consent."

The final recommendation based on this interpretation was:

"Recommendation (14) That the Family Educational Rights and Privacy Act be amended so as to permit an education agency or institution to designate in its policy implementing FERPA that disclosures may be made on a routine basis without the authorization of the parent or student to a particular welfare or social service agency for a specified purpose that directly assists the educational agency or institution in achieving its mission, provided that the categories of information which may be disclosed to such agency are also specified and that further redisclosure by such agency is prohibited."

We believe this interpretation and recommendation confuse an area of the Act which was thoroughly debated and settled with the Department of Health, Education and Welfare in 1976.

Shortly after the passage of FERPA in 1976, a question was raised as to whether or not the Act prohibited educational personnel from reporting incidents of child abuse and neglect as required by state statute without obtaining prior consent from parents. Following upon this line of thinking, it was thought that personnel who complied with their reporting obligations would jeopardize the schools federal funding by having violated FERPA. After reviewing the Act and the proposed regulations, the Committee concluded that this interpretation was incorrect. On May 17, 1976, on behalf of the Committee I wrote the Secretary of the Department of Health, Education and Welfare to ask for a confirmation of our analysis of the statute. We concluded the Act does allow for the release of information concerning child abuse and neglect incidents to state and local authorities covered by child abuse and neglect reporting statutes without prior parental consent. These authorities frequently include social service agencies. A copy of that letter and the favorable response from the Secretary and the Deputy Assistant Secretary for Management Planning and Technology is attached for your reference.

In summary, FERPA allows for the release of this vital information under three sections of the law. Section 438(b) outlines the circumstances under which prior parental consent is not required. Two of these exceptions, state reporting statutes and emergency situations to protect the health and welfare of the student or others, support reporting of suspected cases of child abuse and neglect. Finally, under Sections 438(a), 4(A) and (B) child abuse reports may not be educational records depending on state procedures for classifying such records.

Therefore the Committee feels that the Commission's discussion of FERPA in relation to disclosure to social service agencies is inaccurate and we wished to bring it to your attention. In view of this fact, we recommend that the Commission reconsider its analysis of this aspect of the Act and its final recommendation.

Sincerely yours,

Robert F. Bennett
Governor of Kansas
Chairman, ECS Advisory Committee on Child Abuse & Neglect

RFB/jw

Enclosures: Letter of May 17, 1976 to Secretary Matthews.
Letter of June 16, 1976 to Governor Bennett.
Letter of June 30, 1976 to Governor Bennett.
Child Protection Report Article, 1976.

SOMERSET COUNTY COLLEGE
P. O. BOX 3300 • SOMERVILLE, NEW JERSEY 08876

Office of the
Dean of Student Affairs

Telephone
(201) 526-1200

August 26, 1977

HOUSE SUBCOMMITTEE ON ELEMENTARY,
SECONDARY, AND VOCATIONAL EDUCATION,
RB346C, Rayburn House Office Building
Washington, D. C. 20515

Dear Sir:

One facet of the Family Educational Rights and Privacy Act that has caused an increasing problem in higher education is the requirement to retain release forms for students who have requested their transcripts to be sent out. Under the present system, these release forms must be retained as long as the transcripts exits; i.e., indefinitely, and this is placing a tremendous burden upon the filing and storage systems of any institution that attempts to comply.

I encourage a revision to be made for this particular area of student records, which would release the institution from keeping a copy of the student release form after six months has passed from the date of its issuance.

Respectfully yours,

Dr. Kenneth C. Brinson
Dean of Student Affairs

KCB/js

A public community college serving residents of Somerset County

Gettysburg College
GETTYSBURG, PENNSYLVANIA 17325
(717) 334-3131

OFFICE OF THE DEAN OF THE COLLEGE
PENNSYLVANIA HALL

August 18, 1977

The Honorable William Goodling
1713 Longworth House Office Building
Washington, D.C. 20515

Dear Bill:

I am writing on behalf of Gettysburg College to you in your capacity as a member of the House Subcommittee on Elementary, Secondary, and Vocational Education. The Subcommittee is currently considering the operation of the Family Education Rights and Privacy Act (FERPA, also known as the Buckley Amendment) and the recommendations of the Privacy Protection Study Commission for amendments to the Act.

FERPA was passed (without legislative hearings) primarily to correct abuses in the use of student records at the elementary and secondary levels, but nevertheless the law included higher education even though there was no indication that improper use of student educational records was a problem at the college and university level. In reading the journals of current events in higher education, I have seen few, if any, accounts of complaints about violations of FERPA or complaints that the current law inadequately protects the students' interests. Yet the Commission proposes amendments to the law which will increase bureaucratic regulation of colleges and universities and institute rules detrimental to both the interests of the institutions and their students.

I don't understand why these new amendments are suggested. The accounts in educational periodicals of the Commission's suggestion do not include the reasons for the proposed changes. I have written for the full report of the Commission (Personal Privacy in an Information Society) which I hope will give the reasons. In the meantime, I want you to know some of our specific objections.

Currently, a student can waive his or her right to see a letter or statement of recommendation from a teacher or administrator. The Commission proposes to eliminate this right of the student to allow the statement to remain confidential. Some people at graduate schools and employers have no faith in a non-confidential letter of recommendation. There is no way a law can force such persons to change their low opinion of statements that are not confidential. The Commission's suggestion means that the student will receive no benefit from a letter of recommendation sent to such persons.

The Commission recommends that applicants for admission (not covered by the current law) be given the right to see their files and that all records of unsuccessful applicants be destroyed after 18 months. Since FERPA was passed, many high school guidance counselors refuse to send letters of recommendation. Some still send letters since they realize that unsuccessful applicants will not see the letters. The proposed change will probably end the use of such letters altogether and force a more mechanical, less individualized, admissions process. Furthermore, there is no reason why the government should mandate when records must be destroyed. Colleges may wish, for example, to retain records longer in order to compare the high school records of successful college students, unsuccessful college students, and students not admitted. Also, if an unsuccessful applicant reapplies after two years, it would be helpful to have the original records rather than beginning a whole new file. Finally, colleges do not need the burden of responding to numerous requests from unsuccessful applicants to see their files.

Presently, a student who feels that his or her rights under FERPA are being violated can process an administration complaint with the Department of Health, Education, and Welfare. The Department can ultimately cut off all federal funds to the institution if the complaint is valid and the institution will not remedy it. The Commission proposes that such a student shall have the right to bring a civil action for injunctive relief in a federal district court "without regard to the amount in controversy." Apparently, this would be allowed without first filing a complaint with the Department of Health, Education, and Welfare. You probably recall the case in the Washington area this Spring in which a high school senior went into federal court to force the high school to allow her to attend the senior prom; the school had banned her from the prom as punishment for hitting a teacher in the face with a pie. If students go into a federal court for such trivial issues, there should be reasonable limitations as to the conditions under which a federal law suit will be allowed.

I have listed objections to only three of the Commission's proposals to show why major changes in the law are both unwarranted and not helpful. Many of the other recommendations are also defective. The Subcommittee should be very cautious in recommending changes to FERPA, and any changes which apply to higher education institutions should be based upon substantial evidence of defects in the operation of the current law at these institutions rather than the opinions of seven Commission members.

Sincerely,

Bob Nordvall

Robert C. Nordvall
Assistant Dean of the College

RCN/pmc

cc: Charles E. Glassick, President of the College
Leonard I. Holder, Dean of the College
Frank B. Williams, Dean of Students
Robert E. Butler, Director of Development
F. Stanley Hoffman, Treasurer
Paul G. Peterson, Assistant to the President

NEWS
NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION
Suite 410 Wilde Lake Village Green • Columbia, Maryland 21044 • 301-997-9300
IN CONJUNCTION WITH NATIONAL URBAN LEAGUE AND NATIONAL COUNCIL OF JEWISH WOMEN

FOR IMMEDIATE RELEASE

September 19, 1977

Contact: Bill Rioux
The National Committee for
Citizens in Education

301-997-9300

"NEW STUDY SHOWS PUBLIC SCHOOLS COMPLYING WITH SCHOOL RECORDS LAW--MINOR DIFFICULTIES ARISING"

The results of a recent study by three national organizations show that public schools are successfully following most requirements of the Family Educational Rights and Privacy Act (FERPA), contrary to predicted difficulites.

The study was conducted this spring by the National Council of Jewish Women (NCJW), the National Urban League and the Parents' Network of the National Committee for Citizens in Education (NCCE). The three groups sent interviewers to 169 local school districts in 29 states with a combined enrollment of 6 million children to find out how well the law is working.*

FERPA, also known as the Buckley Amendment, gives parents the right to review their child's complete school record and protects the use of personal records from sources outside the school system unless parents give their permission.

*A total of 45 million children attend 85,000 public schools in 16,000 school districts in the U.S

The study is particularly significant as the largest scale effort by citizens in recent memory to monitor a piece of federal legislation. The findings include evidence that the new law has not overburdened school systems with requests and challenges as some predicted. Statistically, the surveyed showed that:

- *90% have advised parents of their rights under the law.
- *95% are obtaining parental consent in writing before releasing information to prospective employers, juvenile courts and social agencies.
- *83% advise parents immediately when information must be released in response to a court subpoena.
- *85% are keeping a log, as required by law, of people given information from a child's record.
- *87% have fully explained hearing and appeal procedures to parents if their request for removal of certain information from the records has been denied.
- *84% have developed new school record keeping policies since 1974, clarifying why school records are kept and how they should be used.
- *90% provide parents with copies of materials from school records upon request.
- *83% report they have enough staff to handle requests for access to records and explanations of test scores and other data in the records.
- *80% of school officials interviewed feel that the law is a good one.

The surveying group noted, however, that there are areas of continuing concern. For example, in the judgment of the Survey interviewers, only about half of the parents knew their rights under the law.

Also:

- *Only 34% of the public schools inform parents that school records include material on microfilm and computerized data.
- *only 45% of the public schools informed parents that they have the right to appeal to a review board of the Department of HEW.
- *only 44% routinely provide parents with copies of the law and their rights.
- *56% provide copies of the law and rights only if parents request them. Some require parents to travel to a central administration building to obtain a copy or to read a single copy posted on a school bulletin board.

The National Council of Jewish Women (NCJW) is a 100,000 member volunteer organization with 200 participating groups throughout the United States. Founded 85 years ago, NCJW is active in the area of children and education.

The National Urban League is a social service agency with a 66 year history of advocacy for parents and students in the education process.

The National Committee for Citizens in Education, a 4 year old organization dedicated to citizen participation in public schools, waged a public awareness campaign that first brought the question of privacy and school records to the attention of Congressional Staff.

After reviewing the results of their survey, the three cooperating groups have pledged a continued effort to protect the privacy rights of students and parents by monitoring this law. They plan periodic reports to the public.

FERPA SURVEY

School Systems, Number of Schools, Number of Pupils (Fall 1975 Data from National Center for Education Statistics, Department of Health, Education, and Welfare)

ALABAMA

53,543 pupils	95 schools	Birmingham City
64,336 "	80 "	Mobile (City-County)
35,812 "	49 "	Montgomery
153,691	224	

ARKANSAS

22,100 pupils	37 schools	Little Rock
11,857	27	North Little Rock
33,957	64	

CALIFORNIA

7,395 pupils	6 schools	Acalanes Union High
2,768	4	Moraga Elementary
46,064	58	Mt. Diablo Unif.
653,618	622	Los Angeles Unif.
2,815	7	Orinda Union Elem.
70,607	130	San Francisco Unif.
12,220	17	San Ramon Valley Unif.
3,615	8	Walnut Creek Elem.
38,642	47	San Jose Unif.
127,418	160	San Diego Unif.
33,364	53	San Bernardino Unif.
998,526	1,112	

CONNECTICUT

2,290 pupils	5 schools	Avon
3,533	6	Bethel
4,080	7	Bloomfield
11,192	16	Danbury
1,833	6	Granby
11,157	22	East Hartford
10,963	20	West Hartford
28,703	31	Hartford
4,562	5	Newtown
1,794	2	(Redding)-Easton
1,402	2	Redding-(Easton)
6,036	8	Ridgefield
5,767	8	Simsbury
19,740	25	Stamford
8,331	11	Trumbull
9,167	16	Hamden
8,514	14	Southington
139,064	204	

DELAWARE

10,990 pupils	16 schools	Alfred I Dupont
5,233	7	Mount Pleasant
14,222	22	Wilmington
30,445	45	

DISTRICT OF COLUMBIA

130,514 pubils	190 schools	District of Columbia

FLORIDA

136,224 pupils	145 schools	Brevard County
244,330	240	Dade County
20,854	34	Leon County
110,213	141	Duval County
511,621	560	

GEORGIA

79,818	142	Atlanta City
19,826	35	Dougherty County
99,644	177	

ILLINOIS

2,938 pupils	9 schools	Highland Park 108
1,494	4	Lincolnwood
3,920	8	Wilmette
509,317	669	City of Chicago
1,248	5	Indian Prairie 204
20,758	40	East St. Louis
22,381	47	Peoria 150
562,056	782	

INDIANA

10,578 pupils	21 schools	Marion Comm.
19,976	33	Hammond City
38,840	47	Gary Comm.Sch. Corp.
84,526	123	Indianapolis
39,248	63	Ft. Wayne Comm.
8,792	14	East Chicago City
201,960	301	

KANSAS

45,571 pupils	103 schools	Wichita 259

KENTUCKY

136,490 pupils	169 schools	Jefferson County
34,543	45	Fayette County
171,033	214	

LOUISIANA

67,731 pupils	13 schools	East Baton Rouge Parish

MARYLAND

21,928 pupils	35 schools	Frederick County
23,081	42	Howard County
172,526	200	Baltimore City
217,535	277	

MASSACHUSETTS

3,030 pupils	4 schools	Duxbury
6,536	14	Gloucester
3,855	6	North Middlesex
13,421	24	

MICHIGAN

8,148 pupils	16 schools	Bloomfield Hills
5,393	8	West Bloomfield
14,208	26	Farmington
4,056	9	Oak Park City
13,042	27	Southfield
2,012	3	Lake Fenton
31,586	49	Livonia
38,938	56	Flint
29,356	58	Lansing
240,032	328	Detroit City
33,387	75	Grand Rapids
420,158	655	

MISSISSIPPI

27,298 pupils	48 schools	Jackson Mun. Sep.

MISSOURI

2,044 pupils	6 schools	Clayton
21,054	26	Parkway
4,779	12	Ladue
6,389	11	University City
51,556	102	Kansas City 33
85,822	157	

NEW JERSEY

10,182 pupils	15 schools	Bridgewater-Raritan
2,005	4	Chatham Township
17,306	23	Cherry Hill Township
3,086	5	Evesham
3,005	4	Maple Shade Township
3,895	9	Milburn Township
7,398	12	South Orange-Maplewood
4,544	9	Summit
7,082	11	Teaneck
2,517	2	West Essex Regional
3,527	5	Hoptacong
3,921	4	Monroe Township (2 separate dists.)
1,974	5	Monroe Township (#2)
17,121	25	Trenton
4,702	7	Westwood Regional
3,619	6	Moorestown
5,821	7	Hackensack
6,614	12	Morris Sch. Dist.
108,319	165	

NEW YORK

13,423 pupils	18 schools	Clarkstown
15,890	20	East Ramapo
2,113	4	Franklin Square
4,905	7	Hewlett Woodmere
7,113	8	Lawrence
5,912	8	Long Beach
2,933	4	Nanuet
3,731	6	Nyack
3,504	6	Pearl River
6,285	9	Ramapo
5,334	8	South Orangetown
8,548	11	North Rockland
8,241	18	Corning-Painted Post
42,367	69	Rochester
26,241	45	Syracuse
10,097	15	Binghamton
166,637	256	

NORTH CAROLINA

27,226 pupils	47 schools	Greensboro

OHIO

2,210 pupils	6 schools	Wyoming
45,293	69	Dayton
95,881	165	Columbus
969	2	Ottawa Hills
11,042	16	Washington
4,114	7	Maumee
2,972	4	Springfield Local
4,197	6	Northeastern (Clark City)
987	2	Southeastern
3,463	6	Mad River-Green
15,066	28	Springfield (2 dists. same name)

OHIO (continued)

6,090 pupils	10 schools	New Carlisle-Bethel
127,800	185	Cleveland
67,703	110	Cincinnati
17,678	31	Canton
405,465	647	

OKLAHOMA

3,630 pupils	3 schools	Jenks
65,565	107	Tulsa City
50,955	109	Oklahoma City
120,150	219	

OREGON

20,203 pupils	37 schools	Beaverton
58,511	120	Portland 01J
78,714	157	

PENNSYLVANIA

64,452 pupils	112 schools	Pittsburgh City
17,319	27	Allentown City
6,594	13	East Penn
4,830	8	Hopewell
11,088	20	Lancaster
263,654	278	Philadelphia City
2,173	3	North East
16,423	26	Bethlehem Area
386,533	487	

SOUTH CAROLINA

51,666 pupils	81 schools	Charleston County
53,865	91	Greenville County
32,333	59	Richland County 01
137,864	231	

TENNESSEE

24,304 pupils	51 schools	Chattanooga City
26,801	50	Hamilton County
116,354	162	Memphis City
32,034	63	Knoxville City
199,493	326	

TEXAS

4,263 pupils	6 schools	Alamo Heights ISD
31,031	33	North East ISD
27,903	34	Northside ISD
11,256	16	Carrolton-Farmers Branch ISD
147,680	183	Dallas ISD
222,133	272	

VIRGINIA

13,670 pupils	22 schools	Alexandria City
136,709	160	Fairfax County
31,428	40	Hampton City
12,209	26	Loudoun County
30,040	39	Newport News City
4,974	7	Williamsburg City-James City/County
8,399	13	York County
237,429	307	

WASHINGTON

16,150 pupils	28 schools	Federal Way
5,456	10	Mercer Island
11,236	20	Northshore
67,652	139	Seattle
100,494	197	

FERPA TOTALS

1.	ALABAMA	153,691 pupils	224 schools	3 school districts
2.	ARKANSAS	33,957	64	2
3.	CALIFORNIA	998,526	1,112	11
4.	CONNECTICUT	139,064	204	17
5.	DELAWARE	30,445	45	3
6.	DISTRICT OF COLUMBIA	130,514	190	1
7.	FLORIDA	511,621	560	4
8.	GEORGIA	99,644	177	2
9.	ILLINOIS	562,056	782	7
10.	INDIANA	201,960	301	6
11.	KANSAS	45,571	103	1
12.	KENTUCKY	171,033	214	2
13.	LOUISIANA	67,731	13	1
14.	MARYLAND	217,535	277	3
15.	MASSACHUSETTS	13,421	24	3
16.	MICHIGAN	420,158	655	11
17.	MISSISSIPPI	27,298	48	1
18.	MISSOURI	85,822	157	5
19.	NEW JERSEY	108,319	165	18
20.	NEW YORK	166,637	256	16
21.	NORTH CAROLINA	27,226	47	1
22.	OHIO	405,465	647	15
23.	OKLAHOMA	120,150	219	3
24.	OREGON	78,714	157	2
25.	PENNSYLVANIA	386,533	487	8
26.	SOUTH CAROLINA	137,864	231	3
27.	TENNESSEE	199,493	326	4
28.	TEXAS	222,133	272	5
29.	VIRGINIA	237,429	307	7
30.	WASHINGTON	100,494	197	4
	TOTALS	6,100,504	8,461	169